

15 Ad

A

COMPENDIOUS VIEW

OF THE

ECCLESIASTICAL LAW,

BEING THE SUBSTANCE OF

A COURSE OF LECTURES

READ IN THE

UNIVERSITY OF DUBLIN,

By ARTHUR BROWNE, Esq. S. F. T. C. D.

PROFESSOR OF CIVIL LAW IN THAT UNIVERSITY, AND
REPRESENTATIVE IN PARLIAMENT FOR THE SAME.

TO WHICH IS ADDED,

A Sketch of the Practice of the Ecclesiastical Courts, with some
Cases determined therein in Ireland, and some useful
Directions for the Clergy.

VOL. II.

DUBLIN:

PRINTED BY R. E. MERCIER AND CO. BOOKSELLERS AND
PRINTERS TO TRINITY COLLEGE; AND TO THE
HON. SOCIETY OF KING'S INNS.

1799.

20

CONTEMPORARY VIEW

ECCLIASTICAL LAW

BEING THE

A COURSE OF LECTURES

DELIVERED AT

UNIVERSITY OF OXFORD

BY ARTHUR BROWN



TO THE
MOST REVEREND
WILLIAM LORD ARCHBISHOP OF ARMAGH,
AND PRIMATE OF ALL IRELAND.

THE TREATISE OF
ECCLESIASTICAL LAWS AND COURTS,
ANNEXED TO THESE LECTURES.
(THE EPTOME OF A LARGER WORK ONCE INTENDED)

IS
HUMBLY INSCRIBED,
WITH THAT GRATITUDE AND AFFECTION
WHICH HE IS UNABLE,
AND THAT RESPECT AND REVERENCE
WHICH HE IS FORBIDDEN
FULLY TO EXPRESS,

BY
HIS GRACE'S

MUCH OBLIGED
AND MOST OBEDIENT SERVANT,
ARTHUR BROWNE.

TO THE

MOST REVEREND

WILLIAM LORD ARCHBISHOP OF ARMAGH

AND PRIMATE OF ALL IRELAND

THE BISHOP OF

ECCLÉSIASTICAL LAW AND COURT

ANNEXED TO THESE STATUTES

(THE HISTORY OF A LAWYER'S WORK)

HUMBLE REQUEST

WITH THE

OF THE

AND THE

OF THE

OF THE

OF THE

OF THE

OF THE

OF THE

OF THE

P R E F A C E,
TO THE SECOND VOLUME.

AMIDST great variety of business, and innumerable distractions of his thoughts, sufficiently known to those who know the author, this second Volume has been completed; circumstances which he hopes will afford some apology for errors, if such shall be found in it. A much better may be drawn from the nature of his attempt, which was not to adhere to the safe and cowardly plan of mere slavish compilation, but to venture opinions of his own, and represent the lights in which subjects appeared to him, an attempt which never can be made without some risk. The advantage derived

to the public from such risk is, that if the plan of the work be right and useful, the errors may be corrected in a second edition, and the haste of the writer not impede the ultimate advantage of the Student. Thus if the theory of Admiralty jurisdiction here given be not perfect, it will at least remind the reader of the extraordinary desideratum of an accurate outline of that jurisdiction at the present day, and the necessity of its being drawn by some abler hand: if the sketch of practice in the Ecclesiastical Courts be not perfectly accurate, the utility and want of such a plan, particularly with respect to the pleadings, will appear plain to those who have been accustomed laboriously and ineffectually to consult the prolixity of Oughton, on many and important, yet frequently occurring points;—and the confused heap of statutes in Ireland, on Ecclesiastical Law, ought to rescue from blame the man who at any hazard endeavours to extricate the clergy out of their confusion. The author, however, humbly hopes, that
as

as far as his attention has been able to reach, the work will not stand in need of so many apologies.

He has been, though not unkindly, criticised for a position in the first volume, viz. that the *lex loci* doth not protect a marriage made abroad with a view of evading a statute at home, and the case of Compton v. Bearcroft, before the delegates, December 1768, which respected a marriage in Scotland, is objected as deciding the point. Now the author never did say that this rule applied to Scotch marriages, (because that part of Great Britain called Scotland is not mentioned in the Marriage act,) and the only note of that case which he had seen, which is in Buller's *Nisi Prius* in the chapter of Ejectments, as there reported, doth not say that this decision extends *beyond* Scotch marriages. On the contrary, Mr. Justice Buller seems to imply, that it doth not; for he has just before observed, that the act doth

not

not extend to Scotland, or parts beyond the seas. I have since, however, seen a manuscript note of this case, in which it is made to go on a general principle, viz. that the *lex loci* is to be applied to cases even accompanied with circumstances marking an intent *to evade the law of England*, though all Mr. Hargrave says in his note on Coke upon Littleton p. 79 as to this case is, that the law seems now fully settled as far as relates to *Scotch* Marriages, but he goes no further. And then Mr. Hargrave continues, " However it may not be amiss to recollect that there have been persons of authority particularly Huberus, a much esteemed writer, who will not allow such cases of *apparent evasion* of the law of any country. With such authorities then, (and what is said by Lord Mansfield in the case of Robinson against Bland *,

* Viz. in general the *lex loci* prevails, but marriages in another country, of *persons going from hence for that purpose*, may come under a very different consideration.

and

P R E F A C E.

v

and what I recollect said from the Bench in this Country in the case of Lord Kilkenny and Bradstreet, and the implication from the cause of Ilderton and Ilderton, * so late as 1793, and no printed case or authority to the contrary before *Compton v. Bearcroft*, and the words of Mr. J. Buller when mentioning that case implying no such general principle from it,) was I necessarily obliged to know that this determination went further than to Scotch marriages, and that it decided a general principle; or even if it did, to acknowledge that it truly laid down a rule, which appertains rather to the law of nations than to the law of England: and will it be said that it is impossible for a legislature to prevent its subjects from mocking its authority, by going a few

* It was there decided that a marriage in Scotland between persons who do *not* go thither for the purpose of *evading* the laws of England, will entitle the woman to Dower in England, *implying*, that if they *did* go for that purpose it would be otherwise. 2 Hen. Black. 145.

VOL. II.

b

leagues

leagues to a neighbouring island, as has been attempted by passing from Ireland to the Isle of Man. However, if the case of Compton and Bearcroft be universal and decisive, I can only say, that it never having been reported, I was unacquainted with its full extent, and reluctantly accede to its authority.

Some objections have arisen, from the sense of the author either not being sufficiently expressed or sufficiently attended to; E. G. the quotation from Douglas, to shew that Visitors could not administer an oath, excited surprise: it was evidently meant only, that they could not merely as Visitors (though Ayliffe in his History of the University of Oxford, says they can) and that seems to follow from the saying in Douglas, that even the Judges of the land, acting merely with general powers as Visitors did not take upon them to examine upon oath, but this position was not meant

meant to interfere with powers expressly and specially given by lawful authority, nor with the point as to the power of the King to enable Visitors to examine on oath *. All power certainly to administer an oath if not given by some act of parliament, must be looked for in the Common Law, and if it be not there found, cannot be found any where else.

I have heard the representations made by me of the state of the Slaves in the West-Indies contradicted and condemned. The strongest evidence respecting it came within my own personal ken in the early part of life.—And while those positions are sustained by the body of testimony produced to the

* This power in the College of Dublin is expressly given at *visitations* by the statutes. On Mr. Berwick's *appeal* in that College, in 1776, I recollect council objecting to the exercise of the power, and talking of the penalties of *premunire*. How far in England the abolition of the oath *ex officio* affects this power, I will not take upon me to say.

British Parliament by Mr. Wilberforce, supported by his high character and authority, contradiction will not avail. Indeed it is impossible for facts to be more irrefragably proved, or more audaciously denied. May his glorious efforts, (truly deserving of a term with such abuse of language usurped by warriors and by conquerors) subdue this absurd and horrible wickedness, and prevent by their ultimate ~~success~~, that stain being indelible on the British parliament, which its dilatory progress and neglected resolutions have hitherto tended to impress!

Whatever defects may be found, it is natural to suppose that the manifest utility of the plan, and the great want in Ireland of such an undertaking, will either induce the world to afford an opportunity of supplying them at some future period, or encourage some abler hand to found some more complete superstructure on this foundation, which he will not fail to find facilitating to his labours,

bours, and useful in saving him an infinity of trouble. The opener of the mine always gets much more of the toil than of the profit.

Though the part which treats of Ecclesiastical Law relates principally to Ireland, it must be useful to every English Barrister who has occasion to consult, or happens to be consulted on the laws of that kingdom.

I shall only add a word to apologize for the great quantity of note. It was owing to the inexperience of the author as to the art of printing, which made him chuse a larger letter, as thinking the size of the manuscript would not be proportional to the intended size of the volume, whereas on the contrary he not only was obliged to omit much of his materials, but also to crowd the rest in a great measure into notes.

As to the various errata, and great defects in punctuation, he can only excuse them, by the impracticability in his great hurry of affairs of attending to the supervision of the
press,

press, and the impossibility in Ireland of getting for hire a proper corrector of the press, must therefore pray the reader to look carefully at the page of *Errata*.

* In the Appendix the Author has not inserted the arguments of other Advocates, nor what was said by Judges on giving judgment, but merely the judgment itself, not thinking himself at liberty without permission to go further.

Sept. 1, 1799.

* To the criticisms of the reviewers on certain errors of stile, though perhaps the Author might plead a justification, by those ellipses which rapidity of thought often leaves to be supplied by the reader*, he would rather plead guilty. He is not so humble as to acknowledge any incapacity of writing correctly, but his hurry has been great, and his occupations many, and something possibly may be ascribed to mistaken compliance with that false taste for tumid diction too prevalent in Ireland, but surely the didactic parts are not guilty of turgidity, and in prælections more liberty is allowed and more ornament expected.

* See the *Errata*.

CONTENTS.

THE LECTURES CONTINUED.

	Page
BOOK III.	
ON WRONGS AND THEIR REMEDIES.	
LECTURE I.	
<i>On Private Wrongs.</i>	3
LECTURE II.	
<i>On Public Wrongs.</i>	21
LECTURE III.	
<i>Of the Roman Courts and Actions.</i>	45
	ON

TREATISE.

ON ECCLESIASTICAL LAW.

CHAP. I.

Of the Courts Ecclesiastical. 1

CHAP. II.

Of a Roman Suit, or its conduct by the ancient Civil Law. 17

CHAP. III.

On the Practice of the Canon Law. 71

CHAP. IV.

On the Practice of the Ecclesiastical Courts. 89

CHAP. V.

On the Practice of the Court of Admiralty. 149

CHAP. VI.

Of the several Orders of Persons in the Church. 201

CHAP.

CONTENTS.

3

Page

CHAP. VII.

Of Ecclesiastical Benefices. 284

CHAP. VIII.

Of Ecclesiastical Property. 320

APPENDIX.

No. I.

Notes of some cases and points determined in the Ecclesiastical and Admiralty Courts in Ireland since 1785. I

No. II.

Advice to Students of Law. 52

No. III.

Cases interesting to Ecclesiastics decided in England since Dr. Bullingbrooke's Work on Ecclesiastical Law was published. 71

No.

No. IV.

*Table of Irish Ecclesiastical statutes passed since the
publication of Bullingbrooke's Ecclesiastical Law.*

Page 75

No. V.

*Some additional late cases in the Ecclesiastical and
Admiralty Courts.*

79

No. VI.

MATERIAL notes omitted in their proper places.

EXPLANATION

OF THE

MARGINAL QUOTATIONS.

FROM THE BOOKS OF THE CANON LAW.

THE Decretals of Pope Gregory the Ninth,
Book the first, title the ninth, chapter the sixth, ^{X. 1. 9. 6.}
paragraph the fourth. ^{4.}

Decretals of Pope Boniface the Eighth, are ^{IV. 3. 4. 23}
thus quoted

Book 2nd, title 5th, chapter 2nd, of the ^{Cle. 2. 5.}
Clementines. ^{2.}

Extravagants title 14, chap. 3. ^{Extra. 14.}
^{3.}

Communes, book 3rd, chap. 2. ^{Com. 3. 2.}

Decrees, 1st. part Distinction. 76. ^{Dec. 76.}

Decrees, 2nd. part, cause 16—question the ^{2. 16. 7. 3.}
7th, chap. 3.

Decrees, 3rd part, Distinction the first, chap. 2. ^{Con. 1. 2.}

At

At the reformation, it was enacted in Parliament, by statute 25 Hen. VIII. ch. 19. * revived and confirmed by 1 Eliz. ch. 1. that a review should be had of the Canon Law; and till such review should be made, all Canons, Constitutions, Ordinances, and Synodals provincial, being then already made, and not repugnant to the Law of the land, or the King's Prerogative, should still be used and executed, and as no such review has yet been perfected, upon these statutes now depends the authority of the Canon Law, and Provincial and Legatine Constitutions in England. Sir W. Blackstone.

The business then is, to inquire first what is the Canon Law upon any point; and then to find out, how far the same was received here before the said statute; and then to compare the same with the Common Law, and with the Statute Law, and with the Law concerning the King's prerogative, (which also is part of the Common Law) and from thence will come out the genuine Law of the Church. Dr. Burn.

* In Ireland 28 Hen. VIII. ch. 13.

ON WRONGS
AND
THEIR REMEDIES.

VOL. II.

B

The Reader must ever be reminded, that this short but I hope careful selection and abridgment, professes only to convey to the common Lawyer the general outline of the Civil Law, and not to insert any thing superfluous, or to the present day uninteresting. It follows, that the Roman Criminal Law cannot take up long consideration.

De publicis Judiciis summo digito et quasi per indicem tetigimus; diligentior eorum scientia ex latioribus pandectarum libris adventura est.

Conclusio Institutorum.

LECTURES

ON THE

CIVIL LAW.

BOOK THE THIRD.

ON WRONGS AND THEIR REMEDIES.

Lecture the First.

ON PRIVATE WRONGS.

THE clear method pursued by the framers of the Civil Law, is not least conspicuous in treating of Private Wrongs. Yet here, the Reader must not be surpris'd to find many things treated of and considered as Private Wrongs and the subjects of civil actions, which we have been accustomed to consider only in a criminal light. Thus Theft and Robbery, tho' they did

not in the later times of the Empire pass with impunity from the hand of public justice, were for a long time considered as matters not immediately relating to the public, and to be compensated by private reparation (1). And even after they became the objects of criminal law, a civil action still remained in the power of the injured party. Under the general name however

(1) At first at Rome by the Twelve Tables, theft was punished criminally. Afterwards during many ages it was not punished criminally; in Justinians' time it was, but not capitally. Draco punished it capitally—The Jewish laws, and Solon pecuniarily.

It has been doubted by able men and is a question for humanity and sound policy, whether theft, or even robbery unaccompanied with death or wound, ought to be punishable with death. I will not with Sir W. Blackstone say, (for which he has been warmly censured by Dr. Christian,) that theft is only a violation of social rights, and not of natural; but it is my humble opinion, that to punish it with death, is neither necessary in society, nor agreeable to the will of God; were it not for the pious subterfuges of Juries, and the humanity that prevents the law from being literally executed which seldom is suffered to fall on any but hardened and old offenders, we should shudder at our code; tho' it must be acknowledged, that later statutes have alleviated the punishment of first offences and smaller thefts.

of

of theft, were included many deeds, which with us would not bear the name, but would rather be called *Conversions*, and the subjects of an action of *Trover*.

We will therefore (reserving the Criminal View of Wrongs for the next chapter,) consider now the divisions of Private Wrongs made by the Institutes, together with the satisfaction to be made for each of them respectively, to the offended party.

Obligations or rights arising to the injured party from the torts or wrongs done by another, were divided into those arising *ex delicto*, and those *quasi ex delicto*—from *torts*, and *quasi torts*; and offences were accordingly partitioned into proper and improper.

Torts or wrongs *properly* so called, as distinguished from quasi torts, were classed under four heads—*Theft*, *Robbery*, *Damage* and *Injury*—meaning by the first, abduction or conversion of property without force;—by the second, that attended with force;—by the third, damage done to property without taking away the thing damaged, or deriving benefit to the owner;—by the last, injury to the person or character of a free man.

Theft was defined *contrectatio fraudulosa, lucri faciendi gratia, vel ipsius rei, vel etiam usus ejus, possessionisve*.

Theft

At the reformation, it was enacted in Parliament, by statute 25 Hen. VIII. ch. 19. * revived and confirmed by 1 Eliz. ch. 1. that a review should be had of the Canon Law; and till such review should be made, all Canons, Constitutions, Ordinances, and Synodals provincial, being then already made, and not repugnant to the Law of the land, or the King's Prerogative, should still be used and executed, and as no such review has yet been perfected, upon these statutes now depends the authority of the Canon Law, and Provincial and Legatine Constitutions in England. Sir W. Blackstone.

The business then is, to inquire first what is the Canon Law upon any point; and then to find out, how far the same was received here before the said statute; and then to compare the same with the Common Law, and with the Statute Law, and with the Law concerning the King's prerogative, (which also is part of the Common Law) and from thence will come out the genuine Law of the Church. Dr. Burn.

* In Ireland 28 Hen. VIII. ch. 13.

ON WRONGS
AND
THEIR REMEDIES.

VOL. II.

B

The Reader must ever be reminded, that this short but I hope careful selection and abridgment, professes only to convey to the common Lawyer the general outline of the Civil Law, and not to insert any thing superfluous, or to the present day uninteresting. It follows, that the Roman Criminal Law cannot take up long consideration.

De publicis Judiciis summo digito et quasi per indicem tetigimus; diligentior eorum scientia ex latioribus pandectarum libris adventura est.

Conclusio Institutorum.

LECTURES

ON THE

CIVIL LAW.

BOOK THE THIRD.

ON WRONGS AND THEIR REMEDIES.

Lecture the First.

ON PRIVATE WRONGS.

THE clear method pursued by the framers of the Civil Law, is not least conspicuous in treating of Private Wrongs. Yet here, the Reader must not be surprised to find many things treated of and considered as Private Wrongs and the subjects of civil actions, which we have been accustomed to consider only in a criminal light. Thus Theft and Robbery, tho' they did

not in the later times of the Empire pass with impunity from the hand of public justice, were for a long time considered as matters not immediately relating to the public, and to be compensated by private reparation (1). And even after they became the objects of criminal law, a civil action still remained in the power of the injured party. Under the general name however

(1) At first at Rome by the Twelve Tables, theft was punished criminally. Afterwards during many ages it was not punished criminally; in Justinians' time it was, but not capitally. Draco punished it capitally—The Jewish laws, and Solon pecuniarily.

It has been doubted by able men and is a question for humanity and sound policy, whether theft, or even robbery unaccompanied with death or wound, ought to be punishable with death. I will not with Sir W. Blackstone say, (for which he has been warmly censured by Dr. Christian,) that theft is only a violation of social rights, and not of natural; but it is my humble opinion, that to punish it with death, is neither necessary in society, nor agreeable to the will of God; were it not for the pious subterfuges of Juries, and the humanity that prevents the law from being literally executed which seldom is suffered to fall on any but hardened and old offenders, we should shudder at our code; tho' it must be acknowledged, that later statutes have alleviated the punishment of first offences and smaller thefts.

of

of theft, were included many deeds, which with us would not bear the name, but would rather be called *Conversions*, and the subjects of an action of *Trover*.

We will therefore (reserving the Criminal View of Wrongs for the next chapter,) consider now the divisions of Private Wrongs made by the Institutes, together with the satisfaction to be made for each of them respectively, to the offended party.

Obligations or rights arising to the injured party from the torts or wrongs done by another, were divided into those arising *ex delicto*, and those *quasi ex delicto*—from *torts*, and *quasi torts*; and offences were accordingly partitioned into proper and improper.

Torts or wrongs *properly* so called, as distinguished from quasi torts, were classed under four heads—*Theft*, *Robbery*, *Damage* and *Injury*—meaning by the first, abduction or conversion of property without force;—by the second, that attended with force;—by the third, damage done to property without taking away the thing damaged, or deriving benefit to the owner;—by the last, injury to the person or character of a free man.

Theft was defined *contrectatio fraudulosa, lucri faciendi gratia, vel ipsius rei, vel etiam usus ejus, possessionisve*.

Theft

T H E F T.

Theft was divided into manifest, and not manifest; the first being, when the person was actually caught in the fact (2), or was discovered with the property in his hands before he reached his destination; the distinction was important, because the damages or penalty varied, being in the one case fourfold of the property taken, in that of not manifest theft, only double.

It has been observed, that in many cases, theft answered rather to what we would call conversion, and accordingly the Institutes establish a rule, that every intermeddling with or using another man's property against the will of the owner, is *furtum* (3).

The action and remedies for theft were reasonably extended to the aiders and abettors, but not to the mere adviser. The son and the slave,

(2) Quem Græci *εἰς αὐτὸ φερω* appellant. Inst.

(3) Inst. lib. 4. tit. 4. Furtum autem est non solum cum quis intercipiendi causa rem alienam amovet; Sed generaliter cum quis alienam rem invito domino contrahat. Itaque siue Creditor pignore, siue is apud quem res deposita est, ea re utatur—siue is qui rem utendam acceperit, in alium usum eam transferat, quam cujus gratia ei data est, furtum committit.

if

if they committed depredation on the property of those in whose power they were, committed theft but not remediable by action, since no action could lie between the parties: and yet it was so far theft, that as in all other cases of *furtum* if the property thus by them taken was handed over to another, the new possessor could make no title to it by prescription, nor could any possessor *malæ fidei*, support an action for the thing or its value.

The *actio furti* was given to the person having an interest, altho' not the absolute proprietor, as to the pawnee, who as the Institutes observe, might rather chose to bring such an action of Trover for the *thing*, than to proceed merely against the *person*; and thus the taylor or the dyer who mislaid the goods committed to his care could maintain this action, and not the owner, whose remedy lay over against his tradesman, by an *actio locati* (4).

A buyer

(4) It differed therefore from our action of Trover in which property is necessary in the plaintiff; and from our action of Detinue, inasmuch as the thing itself could not be recovered, but damages for the loss of it; if the thing itself was to be recovered, the proprietor brought an action *vindicando*, against the possessor; if the possession

A buyer had not this action before delivery, so that previous possession seems to have been necessary to maintain this action.

If there were divers persons concerned, they all were liable but to one and the same pecuniary penalty amongst them; yet any one of them might be sued for the whole, which discharged the rest *civiliter* (5).

The *actio furti* did not lie against the heir of the wrong doer, as being a penal action *ex malificio* (6).

OF RAPINE, OR ROBBERY.

THIS tort is here also considered for the present merely in a civil light, and is distinguished from simple theft by the essential concomitant

possession had passed to another, then against the original wrongdoer *condicendo*. *Rei enim furtivæ persecutio soli domino competit, five de rei vindicatione quaeritur, five de conditione furtiva.*

(5) On a similar principle by our law, torts may be separated, but not contracts.

(6) Thus with us, wherever the cause of action is really a *delictum*, it doth not survive against the executor. Where it is not so, some action survives, but not such an one as in its form of pleading, sounds to be *ex delicto*, vid. Hambly and Trott. Cowper 375.

of

of force: it could be only of things moveable, and the offence included in its definition malice of mind and wicked intention, and therefore could not extend to the mistaken claimant of his supposed property.

If however a man took by force his real or imaginary property he did not go unpunished, for in the first case he forfeited the goods, in the latter was subject to damages in double the value; for force was by the law abhorred (7).

The remedy for this violent detraction, was originally by the *actio furti*; but the Prætors added two special remedies by the action *de Vi bonorum raptorum*, and *Damni illati*, in the former of which, the plaintiff sued for fourfold damages, in the latter for double.

These actions, like the *actio furti*, were maintainable by any person having an interest, without absolute property, as by a mortgagee, or an usufructuary; and altogether the same principles which directed who could bring the first mentioned action, governed this also.

(7) Thus ours and all wise laws generally prohibit force to the injured, and direct him to appeal to justice, to avoid the numberless evils which must ensue from what is vulgarly called taking the law into a man's own hands, with all the passionate fruits arising from such heated intervention.

OF DAMAGE.

By injury, the Roman law meant offence against the person. By damage, against the property or estate, whether that consisted in lands goods or any other property. In this general acceptation, it includes both theft and robbery, but is more particularly applied to the destroying, spoiling or deterioration of the thing, without actually taking it away, or deriving advantage to the offender.

Faultiness or injustice were included in the idea of damage; thus the accidental wound inflicted on a Slave by the shooter of an arrow or the rider of a runaway horse gave no action to the master, if the former event happened in a place usually devoted to such exercises, or the latter did not arise from want of skill (8); but the soldier who shot his dart in an unaccustomed spot, the unskilful rider who mounted an unmanageable horse, or the unskilful physician (9) who attempted the cure of a domestic, were justly answerable for the consequences to the

(8) Killing at a tournament, was not *damnum*.

(9) Plinius alicubi scribit, *foli medico hominem occidere impune esse*.

III.]
Lect. I.] AND THEIR REMEDIES. 11

owner of an injured slave, who might not only bring his civil action, but also prosecute criminally (10).

The special remedies for damage done were given by the Aquilian law, which in its first chapter ordained, that he who injuriously killed the bondman or cattle of another, should pay the lord or owner for damage so much money as had been made from their service during the year preceding; and by its third, (11) provided remedies for damage done also to inanimate things.

The action being of a penal nature, the value of the thing damaged was taken at its highest rate at any period of the year preceding, and every incident was taken into consideration, as if one out of a well matched pair of horses was killed, the injured party was to be additionally

(10) We may here see plainly the Roman distinction between damage and injury. The freeman wounded had not a *direct* action from thence, because a man could not say, that his estate was *directly* diminished by such wound, but by equity and interpretation of law he might be relieved for the loss of his time and the charge of his cure, for by these means his *estate* has been impaired.

(11) The second, when the Institutes were published, had fallen into disuse.

recompensed in damages for the diminution in the others value; and on the same principle the action could not be maintained against the heir of him who did the damage, unless such heir was enriched by the damage.

Tho' the damage was not done by a person, but by a thing, E. G. a Slave or a Quadruped, (12) the owner of that thing was liable in damages; and if more persons than one were concerned in its perpetration, so penal was the action, that each appears to have been liable by law to pay the whole recompence, and payment by one did not discharge his companion (13).

We have hitherto spoken of damage done, but it may be also necessary to provide against damage feared from a thing to be done, or such as is apprehended from a thing now done or from a work actually erected.

The former inlet to wrong was guarded by an edict of the Prætor called *Nunciatio novi operis* ;

(12) The action was in this case called by the quaint name of the action *si Quadrupes pauperiem fecerit*, for pauperies was here defined *damnum sine injuria facientis datum*,

(13) See Dig. 9. 2. 11. 2. From another passage in the Pandects, it should seem, that this action would lie against a judge or magistrate acting against law and justice. See Dig. 9. 2. 29.

—the

—the latter, by an action de *damno infecto*, or where all other remedies failed, by Prætorian aid and a remedy in equity, stiled an interdict, which may be justly translated an *Injunction*; but these things are more properly placed under the head of improper offences, or *quasi torts*.

OF INJURY.

INJURY when used in a specific sense by the Roman law, includes the idea of contumely, and might be committed by deed, as assault or battery; or by word or writing defamatory and libellous.

Injuries by deed were distinguished into such as were atrocious, and such as were not.

Atrocious Injuries were so deemed, from the degree of the violence, as the wound, mayhem or assault were more or less desperate—from the *locus in quo*, as if done in the forum, the theatre, or in the presence of the court,—or in respect to the person as committed on a senator, a magistrate, or a patron. These circumstances it was necessary to point out in the libel, and also to state that no reconciliation or remission had subsequently taken place, which would put an end to all penal actions, tho' not to those of mere reparation.

An

An action might be brought not only for an injury done to the plaintiff himself, but also to those under his power, as his daughter or wife. With respect to his slave indeed, the action did not lay, if he had been merely affronted, or even contumeliously struck; the assault must have been atrocious. The free servant must sue in his own name (14).

The legal remedy for an injury to a married daughter might be sought not only by her father, but by herself and her husband; the wife was not allowed to sue for wrongs committed on her consort. Even the attempt to solicit the chastity of a modest and virtuous woman was the subject of an action.

The Twelve Tables for a limb broken or disfigured established the rude law of retaliation—and for smaller injuries fixed small pecuniary mulcts agreeable to the barbarous simplicity of the times.

Greater civilization introduced decrees for damages really proportioned to the degree of the injury, to be estimated in the first instance by the feeling of the party, whose resentments were moderated by the final discretion of the

(14) This is almost the only mention I have met of free menial servants at Rome. Inst. lib. 4. tit. 4.

Prætor. And the Comelian law introduced a particular form of action, in the cases of assault, battery, or forcible entry.

In considering verbal injuries, the law was not inattentive to the discrimination of what words should be deemed actionable, and what not. To call a man Traitor, Usurer, Forger, Bastard, Bankrupt, was particularly penal—and without entering into a tiresome and useless detail, I shall only observe, that affected or ironical compliment was not permitted to screen the defamer (15).

But upon injuries by writing, or libels, the Civil Law is most particularly severe.

The person who framed—who wrote down,—who read to others or published, or who advisedly bought or sold an infamous libel, was subject to the penalties of the law.

These penalties were, if the injured party proceeded civiliter, besides damages, incapacity of testation, so that the libeller could neither be a witness nor make a will; if he proceeded criminaliter, the punishment or conviction was death, and such was the severity of the law, that it extended its vengeance not only to the framer,

(15) E. G. Tu es bonus homo, which at Rome conveyed the hidden meaning of Cornutus.

but

but to him who omitted to destroy it, when it was in his power (16).

QUASI TORTS.

OF improper offences, trespasses, or *quasi delicta*, which might be committed without malice or ill design, the first enumerated is one unknown to us, the judicial pronouncement of an erroneous sentence (17). If the judge pronounced a wrong judgment from corrupt motives, he was rendered infamous, and condemned in the whole value of the suit with costs,

(16) Code 9. 36. This however must be understood to mean only in the case of very desperate libels indeed, and I apprehend only took place when the libel charged the abused with a capital offence. Nor was this the law in any case during the Augustan age and more polished times of Rome, but only in the early æra of the rising republic and later periods of the declining empire, the severity of the law being restored by Valentinian.

The same distinction seems to have been made as with us, as to allowing the party to plead the truth of the charge, in a civil, but not in a criminal suit.

(17) Bracton however says, that before his time judges had made the suit their own by giving an erroneous judgment.

superadded

superadded to a fine adequate to triple his inducement, if he had received a bribe. If the sentence had been in a criminal case, banishment and confiscation was his lot. But we speak at present of error thro' unskilfulness, without corrupt motive or intention. In such an instance, the judge was said *litem suam facere*, i. e. he was now considered as party to the action, and liable to the payment of what the injured suitor ought to have recovered, a punishment deemed to be just, since he ought not to have taken an office for which he should have been conscious he was unqualified thro' want of scientific knowledge;—but as he acted without fraud or design, it was not a *direct tort* or *proper* offence, but only an indirect *fault* and *quasi delictum*. These regulations in future ages gave way to the more obvious and rational method of correcting the errors of an inferior by appeal to a superior tribunal.

The next kind of trespass which the Civil Law specially dwells upon, is the careless throwing or pouring down, (tho' without mischievous design,) of any thing whereby damage is occasioned to the person, goods, or cloaths; and here it is minute in ascertaining whether the owner of the house, or his tenant inhabiting therein, or the occasional sojourner, or the im-

mediate agent where many dwell in the same house, shall be liable to the penalty recoverable for the negligent precipitation of the instrument of mischief. This penalty, if damage was done only to the property, was double the estimate of the damage done. If the person was injured, the penalty of accidental homicide was ascertained by law at fifty *aurei*, that of wounding was left to the discretion of the Judices, but the law was extremely liberal in valuing the lost time and labour of the man who was thus perpetually rendered unable to work, since it estimated his life at an hundred years, the utmost extent of probability.

The Institutes next consider a subject to us very familiar, and the foundation of many an action. The want of care in persons employed by the owner or master of a ship,—or the keeper of an inn, as to the goods and property committed to the charge of their employers. The master not having entered into any direct contract, an action *ex contractu* did not lie against him, and not having been himself immediately and personally in fault, an action of *tort* or *ex maleficio* could not be supported, and he therefore was proceeded against as guilty of a *quasi tort*, and being liable *quasi ex maleficio*.

Tho'

Tho' no one could be compelled to keep a house of entertainment, yet the host who professed to keep a public house for travellers was obliged to receive all guests that came, provided he had room. If the guest delivered his box or casket to the innkeeper closed and sealed or locked up, without mentioning the contents, and afterwards complained of spoliation, if the box was returned to him in the same state, without any appearance upon it to induce suspicion of fraud, his oath could not be admitted as to the contents, as it might if it was restored broken or unlocked; but he seems to have been allowed to prove the contents by the testimony of others, and so to render the innkeeper liable. And in general if any theft was committed in a ship, inn, or stable, the owner or master was liable, and the guest had his choice of one of three actions.

The first was a Prætorian action for double damage, where the crew of the ship or the servants of the inn had stolen the goods (18). The second an action of theft which extended to the case of its being committed even by a

(18) In potestate sit ejus cui res subrepta sit utrum mallet cum exercitore honorario Jure, an cum fure Jure civili experiri. Dig. 47. 5.

stranger; the third was called an action *de recepto*, which was not viewed in the light of a penal action, and was to recover only simple damages, and therefore extended even to the heir of the spoiler. The party besides these special actions might also have a general action *ex deposito*—but then in this general action, the party was only answerable for fraud or gross negligence, whereas in a special action he was accountable for the slightest fault (19).

Quasi torts, being of infinite variety, to enumerate them all is impossible, and therefore the Civil Law merely dwells upon some of those most prominent, as to which I believe its decisions will be found nearly analogous to ours.

(19) For these distinctions, see the chapter on contracts above.

Lecture Second.

OF PUBLIC WRONGS.

THE light in which crimes have appeared to different legislators, and the punishments by various judicatures thought meet and proportioned to the degrees of offences, are instructive to the senate and interesting to the people. The provisions of Rome in its more enlightened and moderate times, may perhaps appear more reasonable and less sanguinary than our own (1).

Offences

(1) In the progress of the republic, the penal laws softened in their rigour—with us the converse seems to have been the case, by the perpetual acervation of new statutes taking away the benefits of clergy. In matters of private concern, the humanity of judges and juries makes the severity of the laws less felt; but in matters

Offences against God and Religion are particularly the subject of the 77th Nov. whose title is *ut non luxurientur homines contra naturam neque blasphemetur in Deum*, and it provides that hardened and obdurate offenders shall be punished with death, and enjoins attention to its mandates, by the strictest injunctions to the magistrates under pain of the Divine displeasure, and in this world of the Imperial indignation.

Apostacy from Christianity to Judaism, Paganism or other false religion, was punished by Constantius with confiscation of goods; and if the apostate endeavoured to pervert others, the emperors Theodosius and Valentian added capital punishment. And heresy was often the prelude to death, as in the instance of the Manicheans under Theodosius and Justinian (2).

Tho' blasphemy, as we have observed, was so severely punished, common cursing and swearing seems to have been left to the tribunal of heaven, for saith the Code 4. 1. 2. *Jurisju-*

matters of state what a horrid picture of cruelty and injustice, of corrupt and time-serving judges the ermined instruments of legal murder, do the state trials of the last and its preceding century exhibit.

(2) We have before observed some legal incapacities of heretics, such as the incapacity of testation.

randi

randi contempta religio satis Deum ultorem habet, meaning the offence of common swearing in common conversation, and not deliberate perjury as to a specific fact, which seems to have been punishable, even tho' committed out of a court of justice (3).

The absurd charge of witchcraft, to the reproach of human reason, was listened to by the civil as by most other laws. The wizard and his confuter were both punishable with death, but the laughable wisdom of Constantine was inclined to compromise the matter, and to allow magic if exerted for a good purpose.

Of acts of toleration, or of penal statutes for deviations in discipline or ceremonies, little or nothing is said, tho' any affront to the established religious ceremonies of the state was avenged, like any other breach of order. But indeed the penal statutes form so small a part of the Code and Pandects, that detail cannot be looked for, and from the same cause we are at a loss to trace the particular provisions against drunkenness, frequenting of brothels, and such like offences.

(3) See Dig. 12. 2. 13. 6. *Si quis Juraverit dare se non oportere, & perjeraverit, fustibus eum castigandum rescribit Imperator.*

It seems indeed, that for licenced fornication the Civil Law assigned no punishment, and a woman was allowed openly to follow the profession of an harlot, after having obtained a licence for it from the grave *Ædiles*, the miserable trade being thought a sufficient punishment for itself (4). Thus Tacitus says, *Annal.* 2. 88. *Victilia, Prætoria familia genita, licentiam stupri apud Ædiles vulgaverat, more inter veteres recepto, qui satis pœnarum adversus impudicas in ipsa professione flagitii credebant.* But if any one presumed to exercise this trade without leave of the magistrate, they might be fined or driven into banishment. And he who he prostituted his wife or daughter for gain was punishable even with death (5).

The emperors apparently more anxious to vindicate their own dignity, than to avenge the affronted Majesty of heaven, have been much more prolix in their provisions against treason, than against irreligion. This formidable crime, divided from early times into *perduellio* or direct acts done against the personal safety of the

(4) Heinec. *Antiq.* lib. 4. tit. 18. Something of this kind took place in Holland, as to their *spiel* or dancing-houses.

(5) Nov. 14.

prince, and *Læsa Majestas*, whatever was attempted indirectly against the dignity and prerogative of the republic or prince. To attempt the emperor's life is an instance of the first, to pretend to coin the money sanctioned by his stamp and image of the second. Both were guarded against by a number of successive laws, till they all finally merged in the great statute of treasons, called the *Lex Julia Majestatis*.

This Julian law was twofold, the former introduced by Julius Cæsar interdicting from fire and water those guilty of treason—the latter the work of Augustus, which pronounced all persons guilty of treason who attempted any thing in violation of the *Majestas* or sovereign authority of the state or of the prince whether by act or writing, a law which however severe was still further aggravated by Tiberius who extended its penalties even to words: nay so outrageous were its provisions as to include those who shewed any disrespect to the statue or effigies of the prince, even to the ridiculous excess of noticing the giddy profligate who happened to bear into the stews a ring stamped with the Imperial image (6).

The

(6) If however a man accidentally hit the emperor's statue with a stone, or hammer his old bust in repair-

The eagerness of tyrants to detect treason occasioned the most extravagant violation of all principles, in the mode of investigating its secret machinations. Persons of the most notoriously infamous characters, and rendered by their infamy (7) legally incompetent to give evidence in any other case, were admitted to prove the highest of crimes. Women,* soldiers, slaves, those in a state of pupillage, freedmen, persons of every order and degree were gladly received as accusers against the unfortunate, and perhaps innocent. On every side the sword hung by a thread near the heads of all the subjects of the state, and to use the words of the English Parliament in the reign of Henry 4th, No man knew how to behave himself for doubt of the pains of treason.

The same dreadful eagerness to protect a government whose greatest safety should ever be in the goodwill and affection of its subjects, broke thro' every tender tie of human nature to reach the real or supposed criminal. The son

ing it, he is not guilty of treason say most gravely the Pandects.

(7) Dig. 48. 4. 7. Qui stipendium merebant accusare non poterant. Heineccius lib. 4. tit. 18.

was

was bound to impeach the father, the wife the husband, the friend the participator of his heart, the obliged his benefactor; for all private relations and domestic affections were to bow before the welfare of the state, or possibly the security of a tyrant.

Yet their law of treasons was in some instances more indulgent than ours. To conspire the death of the queen is treason with us, not so of the empress with them (8). The wives of traitors did not suffer from their treason, and were capable of retaining their dower (9); and the father, the daughter, and the grandsons were screened from the forfeitures which affected immediate male descendants.

Railing words against the emperor (were as with us) a high misdemeanor but not treason,

(8) D. I. 3. 31. I here follow the opinion of Wood, tho' I do not see how it follows from the authority, quoted by him, which is. *Princeps legibus solutus est, Augusta autem legibus soluta non est. Principes tamen eadem illi privilegia tribuunt quæ ipsi habent.* This proves her indeed to be a subject, but so is our queen a subject.

(9) C. 9. 8. 5. 5. With us the wife forfeits her dower for the treason of her husband, but not her jointure.

(10) and the same rational principle in both laws directed, that a wish or endeavour to commit treason must amount to some overt act or be manifested thereby—that the imagination and struggle of the mind must be demonstrated by some open act.

The penalty of treason was the death of the traitor, destruction of his statues and busts (11), confiscation of all his estates, and vacating of all alienations of his property since the commission of his crime. His sons too were rendered incapable of taking by will, or of inheriting by descent from any ancestor or collateral (12).

If the traitor was summoned and would not appear but absconded, at the end of a year from the time of the citation he was pronounced

(10) Every one knows the two old remarkable reprobated instances of capital punishment for words in the reign of Edward the Fourth.

(11) *Statuas detrahendas*, D. 48. 19. 24. which Wood translates with a carelessness not quite unusual with him, destruction of his coat of arms, as if the Romans had armorial bearings.

(12) Corruption of blood is generally spoken of as a creature of the feudal system, yet here a species of it appears to have taken place, tho' not exactly similar to ours.

contu-

contumacious, and his estate confiscated (13). And even after the death of the criminal, a prosecution might be commenced in order to obtain a decree appropriating his estate to the exchequer and the public funds, that the means which he living would have used to the destruction of the state, might while he lay torpid in the grave be applied to its benefit.

From the crime of treason the eye of the avenging law seems to have turned more immediately and more earnestly to that of adultery than any other, and even antecedently to the consideration of the more horrid one of homicide. In early times the horror of an unusual offence, in later the indignation at its frequency may account for this particular attention.

(13) This then was thought a reasonable exception to that noble sentiment which is breathed by the fifth title of the nineteenth book of the Pandects. "*Absentem* in criminibus damnari non debere, Divus Trajanus, Julio Frontoni rescribit, sed nec de *suspicionibus* debere aliquem damnari, Divus Trajanus Adsiduo Severo rescribit, satius enim esse impunitum relinqui facinus nocentis, (our law says of a thousand,) quam innocentem damnari.

Adultery

Adultery was the carnal knowledge of another man's wife (14), knowing her to be so (15), so that a married man who lay with a single woman was not guilty of that crime, but of the crime called *Stuprum*, if such single or unmarried woman was not a common prostitute (16).

The punishment of adultery was death to the man, (and this extended to the debaucher of a woman even betrothed to another) to the woman (17) scourging, loss of dower, and confinement in a monastery, with liberty however to the husband to take her out and return her to

(14) If committed by a married man with a married woman, the Canon Laws calls it double adultery.

(15) For without such knowledge it was not legal adultery.

(16) I have so explained *Stuprum* from the Pandeets, vol. 4. chap. 33. Yet in the passage of Tacitus lately mentioned, it means common prostitution, and Tacitus was a lawyer.

(17) Her freedom from the pains of death for this crime is ascribed to the self-indulgent part of these ordinances really proceeding from the abandoned empress Theodora the wife of Justinian, tho' sanctioned by his name.

his

his bed if he thought fit, within two years, which if he did not, she was obliged to take the perpetual vows (18).

As the crime was so severely punished by the law, vengeance was not left in the hand of the party (19), except he detected the offender in the act in his own house, and that offender was a person of very low station, degrading trade or profession, or infamous character; this restriction the law declared to be imposed to prevent the unbridled passion of the angry husband from operating without restraint, for it permitted
a father

(18) The punishment of death Heineccius insists was not inflicted in the time of Augustus, of the effect of whose law on this head Horace thus boasts.

Nullis polluitur casta domus stupris, and thinks he knows better than Tribonian, who says it did, and as a proof of it quotes authorities to shew, that the “lex Julia de Adulterio damnatas lege uxores duci vetat, quod perabsurdum foret, si hujus criminis pœna vitam ademisset.” But this only shews, that the woman was not punished with death, for the law I conceive is not speaking of her marrying the adulterer, but any one else. The words of the Digest on this law are, “adulteri damnatam si quis Uxorem duxerit. See Dig. 48. lib. tit. 29. sect. 1.

(19) In Italy and Spain the husband has been permitted by law to kill the adulterer. Our law doth
not

a father to kill the violator of his married daughter's honor, *Adulterum cum filia*, which Wood explains to mean, provided he killed his daughter at the same time; the law trusting the father's tenderness, that he would not do so if she was in his power, wherever he detected the offence; and tho' it did not pardon to the husband the fatal effusions of his wrath under any other circumstances than those above mentioned, it charged him not with the crime of murder, but subjected him if of low degree to perpetual labor, if of higher rank to relegation.

The jealousy of the times of Justinian seems to have been proportionable to their profligacy, for he permitted the husband to caution the person he suspected not to keep company or converse with his wife (20), which warning if disobeyed after being thrice repeated excused the husband from the penalty of murder if he killed the supposed criminal. And even tho' the

not authorise such vengeance, however justies may excuse it; all these and many other provisions are to be found in the forty-eighth book of the Digests, title 5, which treats of the *lex Julia de adulteriis coercendis*, as the fourth title doth of the *lex Julia de Majestate*. They should be perused by those who wish to know more of the Roman laws of treason and adultery.

(20) Nov. 117.

jealousy

jealousy appeared utterly groundless, the magistrate might punish his persevering obstinacy in thus continuing to give uneasiness to a worthy tho' absurd man.

The law was much more rational which permitted strong presumption such as the circumstance of being found in bed together to supply the place of absolute proof, which in an offence of this stamp it is almost impossible to obtain (21).

The consideration of this crime may naturally be followed by that of Stuprum, (which hath been already more than once defined the living of an unmarried man with an unmarried woman who lives in reputation) (22), of bigamy, and of incest and unnatural lusts. Stuprum in persons of rank and situation was punished with forfeiture of half their goods; meaner persons

(21) The same I hold to be our law, yet I have known juries give the most extraordinary verdicts from an erroneous notion, that their oaths did not permit them in actions for *Crim. Con.* to attend to the strongest presumptions, without absolute and almost invincible proof.

(22) This definition found in the Pandects doth not as I have observed seem consistent with the use made of the word by Tacitus.

received corporal punishment with relegation. Sodomy was punished with death; and Incest also if in the ascending or descending line, in other cases with deportation and confiscation. Bigamy was a capital crime, but deflowering a girl not fit for marriage, tho' with her consent, which by our law is a capital offence if she be under twelve years of age, was by the civil punished with banishment or condemnation to the mines.

Homicide. The distinctions of different degrees of guilt in the commission of this act, are nearly the same as by our law. Murder—Man-slaughter (23),—excusable and justifiable Homicide. Homicide with deliberation and premeditated design was punished with death, and

(23) I insert the distinction of manslaughter with great hesitation, *in compliance with the opinion of Wood*; for Dr. Christian says in a note on Blackstone's Commentaries, "In the Civil Laws, and the laws of Scotland, the distinction doth not exist; and persons tried at the Admiralty Sessions where the judges proceed according to the rules of the Civil Law, must either be convicted of murder or acquitted." Yet this law of Scotland seems to be statute law, see Erskine's Institutes: and the Pandects, Lib. 48. tit. 8. 1. Say, "leniendam pœnam ejus qui in rixa causa magis quam voluntate homicidium admisit."

the

the law on this ſubject which principally claims our attention, is the law enacted by one of the greateſt of murderers L. Sulla the Dictator, and thence uſually called the Cornelian law *de Sicariis*. It comprehended under the name of murder moſt of the offences contained in our idea of it, and ſome which tho' in the eye of conſcience evidently ſo appearing, yet by rational and wiſe politicians are thought to be perniciouſly included in its puniſhment, for inſtance, perjury fatal to the life of the accused (24.)

The ſingular vengeance denounced by the Roman law againſt parricide, denotes their hor-

(24) With us, the danger of deterring juſt proſecutions by threatening perjury with death, has outweighed the indignation of the law at this cooleſt of deliberate murders.

The Cornelian law, as quoted in the Pandeſts, lib. 48. tit. 8. 1. enumerates the following crimes puniſhable with death. “ Si quis hominem occiderit,—aut dolo
“ malo incendium fecerit,—aut hominis occidendi vel
“ furti faciendi cauſa cum telo ambulaverit,—quive cum
“ publico Judicio præſſet, operam dediffet ut quis in-
“ nocens condemnaretur—aut qui hominis necandi cauſa
“ venenum confecerit—quive falſum teſtimonium dolo
“ malo dixerit, quo quis rei capitalis damnaretur.”

Qui hominem non occidit, ſed vulneravit ut occidat, pro homicida habendus.

ror of the crime. The criminal was to be scourged and then sewed up in a sack with a furious dog, a cock, a viper and an ape, and thrown into the water, or amidst wild beasts. These animals were chosen as indicative of malice and mischief, or perhaps because they would be more slowly tormenting, and less immediately destructive (25).

Whether manslaughter was distinguished in the manner known to us as to its punishment or not, there certainly was some attention to the distinction between the effects of deliberate malice, and sudden passion. This might have led in the latter law to absolute acquittal, tho' the authority I have mentioned in a note says, *leniendam pœnam*; and in Scotland according to Erskine's Institutes both are equally considered capital (26).

To the horrid crime of suicide, the Roman Stoic was peculiarly indulgent, and tho' the law did not countenance it generally, it was tolerated in many instances, and those instances the

(25) By the Scotch law all the posterity of a parricide are incapable of inheriting—even cursing and beating of a parent infers death, if the person guilty be above sixteen years.

(26) Book 4. 6. 19.

legislature

legislature condescended to point out (27). On duelling it was silent, because the absurd idea had not yet entered the mind of man.

The doctrines and rules respecting excusable and justifiable homicide nearly if not entirely accorded with ours. He who defended himself was not to kill, if he could possibly escape; the person who gave a blow with his fist, was not to be stabbed with a poignard; but if an honourable person was treated ignominiously, as by contumelious beating and scourging, he might defend his honor by the death of his enemy, and the chastity of a woman might be defended at the expence of the aggressors' life. In defence of ones goods killing was not lawful, unless of a thief by night. Casual homicide if it happened in doing an unlawful act, was punishable tho' not capitally.

Theft and Robbery come next to be considered, and that in a criminal light as they were before in a civil.

The punishment of manifest theft was different at different times—mulcts, whipping, and amputation of the hand, but Justinian ordered that

(27) Si tædio vitæ vel impatientia doloris & & D. 48.
21. 3. 6.

the penalty should be confined to fine and banishment. Succeeding emperors ordained severer punishments—for the first offence, whipping; for the second, stigmatizing on the back; for the third, even death by hanging.

The punishment of robbery was various according to the degree of the offence. House-breakers were condemned to hard labour (28), and if by night, the burglar after suffering the bastinado was usually sentenced to the mines. Highway robbers (to whom according to Wood the name of *Latrones* was appropriated,) after repeated offences might be punished with death and hung in chains, and the same punishment might be inflicted on notorious pirates (29).

Circumstances of course aggravated the crime. Sacrilege and manstealing called *Plagium* were

(28) The Civil Law here made an absurd distinction, it required that there should be a taking away, and did not consider a delivery of goods thro' threats and fear as constituting a robbery.

(29) This is not supported by Juvenal:

Conductum latronem, incendia sulphure cepta,

Sat. 13. line 145.

The *Latro* there is not a highway robber.

always

always punished with death (30); *Abigei*, the drivers away of a certain number of cattle limited by the laws, *Balnearii*, the stealers of cloths from persons bathing (31), and *Saccularii* cut purses, were more severely punished, and we have already seen that burglary was distinguished from house-breaking in the day. The receiver and harbourer of a thief or criminal was also punished, but the law so far indulged human weakness and the natural affections of the heart, as to forgive the children, the parents, the husband or the wife who concealed or endeavoured to shelter each other.

Crimen falsi. This name included forgery and every species of fraud and deceit, and therefore according to its nature and degree was punished sometimes with deportation, and sometimes with death. If it was a novel species of fraud, which had not peculiarly come under the contempla-

(30) What was the occasion of this offence being so much noticed is not clear, as military kidnapping was then unknown.

(31) This seemingly trifling regulation, will be explained by the recollection, that every Roman of any note bathed once or twice a day. Judge Blackstone remarks these distinctions of the Civil Law and the reasons of them. Com. vol. 4. chap. 17.

tion

tion of the law, nor acquired an appropriate name, it was ranked under the general head of *Stellionate* (32), and punished according to the discretion of the judge.

Crimen peculatus (33). This meant stealing of the public money or cheating in the public accounts. The punishment was death.

Crimen residui was a misapplication of the public money.

Crimen repeiundarum or Bribery. By this was understood the corrupt receiving of money or presents by persons in public offices, and it extended to the medium of wives or servants. Presents of meat and drink however were allowed, and others to the value of 500 *aurei* in any one year, if the donor had not any suit or petition depending before the donee.

Bribery was punished with death, if thereby an innocent man was condemned—with banishment if the guilty was absolved—and the person that gave the bribe was also punishable.

(32) *Stellionate* so called from *Stellio*, a sort of Lizard with variety of spots.

(33) So called *a pecore* from cattle the first kind of property, or perhaps from the first money being stamped with the image of cattle.

Crimen

Crimen ambitus was the crime of procuring public office by money or other gift, or by any unlawful mode of canvassing and solicitation; under this name was included also the offence of a suitor visiting and courting a judge while his cause was depending before him (34). At one time the officers of the Imperial Court avowedly took rewards for the procurement of office, and were allowed to maintain actions to recover such remuneration, but this practice was abolished by Justinian.

Crimen fraudatæ annonæ was the crime of forestalling and monopolizing the market, and was punishable with death.

The (34) From the charge of corruption the judges of these countries have from time immemorial been perfectly and deservedly free, with very few exceptions. Even Lord Bacon and Lord Macclesfield had something of custom to plead in their behalf, and the last instance was tinged with party. But it is not enough for a judge to be honest; he has to contend with the passions, the prejudices, the partialities, which unknown to himself, may unwittingly impose upon him. To become a hermit is too much to ask, yet he who mixes in society can scarce avoid to hear the common tho' perhaps false fame of the vicinage.

In France, solicitation of the judges (who purchased
Vol. II. G their

The crimes hitherto enumerated had each its appropriated punishment. There were others called extraordinary, and punished by the extraordinary power of the judge. Such were threats of death or bodily hurt,—prevarication, *i. e.*, where the informer colluded with the defendant and made a feigned prosecution.—Removing landmarks,—plundering sepulchres,—breaking down dams,—breaking of prison,—taking unlawful distresses,—women procuring abortion, and latterly the exposing of infants with intention that they should perish,—and under this genus were included vagabonds and sturdy beggars. All such offences were said to be punished arbitrarily, not meaning thereby the wild pleasure of the judge but his sound discretion.

To the black catalogue of crimes and punishments succeeds the smiling title of mercy, liberation, and pardon. The criminal could not be tried twice for the same offence, even tho' he confessed the crime subsequently to his acquittal, but he might be prosecuted for the same fact, if it bore two aspects, *diverso intuitu*, as the son

their places) was avowed and universal. *Je m'en vais Solliciter mon Juge*, was a common and curious phrase. Hence, perhaps, the philosopher will trace one great cause of the downfall of the monarchy.

who

who had killed his father and escaped an accusation of homicide, might yet be tried for parricide, that being a crime of a different nature (35).

One protection of the criminal merits particular attention; that arising from prescription or length of time. For various crimes there were various terms of limitation, but a lapse of 20 years screened the offender from all prosecutions; a regulation which has been imitated by Scotland, and which the Civilians insisted was wise, as they reasoned, that limitation in criminal causes was as necessary to quiet the minds of men as in civil causes to quiet their possessions, that neither property nor life might be uncertain.

We are accustomed to boast of our *Habeas Corpus Act*, as the great glory of English freedom (36); but Rome tho' not equally favoured by the genius of liberty was not altogether without a provision of this nature, such as that if a person accus-

(35) So with us, a man acquitted of a felony may be indicted for a trespass in the same fact; a man indicted under a statute may be found guilty at common law.

(36) And so it is in peaceable times, but unfortunately it is always suspended in the only times when any great number of persons can want its aid, in times of trouble.

ed was not brought to trial within two years, he was to be discharged from the accusation.

The power of pardoning, crowns the munificent beams which issued from the merciful side of the Roman Tribunal. That power which as Montesquieu observes, the principle of despotic governments doth not admit, but which exercised with prudence produces admirable effects.

Lecture the Third.

OF THE ROMAN COURTS AND ACTIONS.

THE nature of the Roman Tribunals during the time of the Republic is wrapt in much obſcurity, and hath given riſe to much controverſy. The ambiguous name of Judices, together with the modern application of it had produced an erroneous opinion, that the perſons ſo called correſponded to our judges. This opinion (1) hath been ſufficiently refuted, and it has been

(1) Neither Dr. Middleton, nor Abp. Potter ſeem to have been aware of the diſtinction here mentioned, between the Judices or Jury, and the Magiſtrates, or Presidents

been proved (2), that they much more resembled the modern jury, and that there presided in the court, a distinct magistrate who pronounced the verdict or sentence of the Judices or Jury.

A great question has been started, and some deductions made from it applicable to celebrated controversies in our own times, whether these Judices were judges of law as well as of fact. During the Roman Republic, says Dr. Halifax, the office of magistrate and judge were distinct and separate. The office of the magistrate was to enquire into matters of LAW, and whatever business was transacted before him was said to be done *in Jure*. The office of a judge was to enquire into matters of *Fact*; and whatever was transacted before him was said to be done *in Judicio* (3). On the other hand, Dr. Pettingal maintains by many elaborate arguments and ingenious quotations, that they were judges

Presidents in the Courts of Judicature, or Judges of the Bench. Dr. Middleton in his *Life of Cicero*, calls the Judices, Judges of the Bench.

(2) Particularly by Mr. Pettingal in 'a Treatise expressly written to shew the antiquity of juries, and their resemblance to the Greek *Δικασται* and Roman Judices.

(3) Halifax Analysis—Book 3. ch. 8. Of the same opinion seems to have been the great Montesquieu.

both

both of law and of fact, and that the presiding magistrate, sometimes called *Judex Quæstionis* had little to do but to preserve decorum in the court, to collect the opinions, and pronounce a sentence conformable to the sentence of the jury.

But a question much more curious, and which I do not recollect to have seen agitated occurs, and that is, how were either the *Judices*, or the magistrate, capable of determining on matters of law. To begin with criminal cases, the *Judices* for all trials in criminal cases, were chosen by ballot on the kalends of January, the *Prætor* taking the ballot, (4) and then (5) out of this whole number was struck the Jury for each particular cause, amounting in number to 81, but

(4) This is the account generally given, yet the *Prætor* seems to have had some further authority, from this passage of Cicero. *Prætores urbani, qui Jurati debent "optimum quemque in selectos Judices referre,"* unless as is most probable, this barely refers to his returning a general list, out of which the Juries for the year were to be taken by ballot.

(5) This very much resembles our method of striking a record Jury, under the act of parliament, previous to the assizes for all Civil causes during the same.

rendered

rendered by a power vested in each party to challenge or reject 15, to 51.

The bodies or orders of which the Select Judges for the year were taken by ballot, varied at different times, and of so great consequence was that point to liberty, that the controversies concerning it gave rise to almost all the interior troubles in the Roman state from the time of the Gracchi to the death of Julius Cæsar, the great contention between the higher and lower orders being who should be Masters of the Judges or Jury, or out of what orders they should be chosen, and one great cause of the odium against those illustrious men, the Gracchi, (6) and of their fatal end, was the transferring the choice of the Judges or Jury from the Senators to the Equites, who were a middle order of Citizens.

At a subsequent period they were chosen half out of the Senators, and half out of the Equi-

(6) “Duos Clarissimos, ingeniosissimos, amantissimos
“plebis Romanæ Viros. Non ut plerique nefas esse
“arbitror Gracchos laudare.

“Gracchi qui Plebi Romanæ commodis plurimum co-
“gitaverunt.”

Cicero de lege Agraria.

(7) By a law of Servilius Cæpio.

tes

tes (7)—(*7) then again out of the Equites only (8)—then again divided (9), and at last by the Plautian law chosen out of the three orders, the Plebeians being added to the former two.

The Senate and Aristocracy being friends of Sylla, and the Equites having been Partizans of Marius, the former made a law that the Judices should be chosen out of the Senators only. But this regulation lasted but ten years, when they were appointed to be chosen out of three orders, (10) the Senators, Equites, and Tribuni Ærarii, and thus they appear to have been at the trial of Milo. (11)

(*7) By the lex Glaucia.

(8) By the lex Livia.

(9) Equester ordo Judicavit quinquaginta annos sine infamia secundum æquum & bonum is the universal testimony of antiquity—ne tenuissima suspicio says Cicero, —Quæ intra decem annos postea quam ad senatum judicia translata sunt nefarie flagiose que facta sunt.

(10) The Tribuni Ærarii were not as the name might seem to import, Quæstors or Treasurers of the army, but representatives of the very lowest orders.

(11) The votes on Milo's trial stood thus :

Condemned by	Acquitted by	
Senators 12	Senators 6	
Equites 13	Equites 4	
Trib. Ær. 13	Trib. Ær. 3	
38	13	Total 51
30 challenged make 81.		

VOL. II.

H

But

rendered by a power vested in each party to challenge or reject 15, to 51.

The bodies or orders of which the Select Judices for the year were taken by ballot, varied at different times, and of so great consequence was that point to liberty, that the controversies concerning it gave rise to almost all the interior troubles in the Roman state from the time of the Gracchi to the death of Julius Cæsar, the great contention between the higher and lower orders being who should be Masters of the Judices or Jury, or out of what orders they should be chosen, and one great cause of the odium against those illustrious men, the Gracchi, (6) and of their fatal end, was the transferring the choice of the Judices or Jury from the Senators to the Equites, who were a middle order of Citizens.

At a subsequent period they were chosen half out of the Senators, and half out of the Equi-

(6) “Duos Clarissimos, ingeniossimos, amantissimos
“plebis Romanæ Viros. Non ut plerique nefas esse
“arbitror Gracchos laudare.

“Gracchi qui Plebi Romanæ commodis plurimum co-
“gitaverunt.”

Cicero de lege Agraria.

(7) By a law of Servilius Cæpio.

tes

tes (7)—(*7) then again out of the Equites only (8)—then again divided (9), and at laſt by the Plautian law choſen out of the three orders, the Plebeians being added to the former two.

The Senate and Ariſtocracy being friends of Sylla, and the Equites having been Partizans of Marius, the former made a law that the Judges ſhould be choſen out of the Senators only. But this regulation laſted but ten years, when they were appointed to be choſen out of three orders, (10) the Senators, Equites, and Tribuni *Ærarii*, and thus they appear to have been at the trial of Milo. (11)

(*7) By the *lex Glaucia*.

(8) By the *lex Livia*.

(9) *Equeſter ordo* *Judicavit quinquaginta annos ſine infamia ſecundum æquum & bonum* is the univerſal teſtimony of antiquity—*ne tenuiſſima ſuſpicio* ſays Cicero, —*Quæ intra decem annos poſtea quam ad ſenatum judicia tranſlata ſunt nefarie flagioſe que facta ſunt.*

(10) The Tribuni *Ærarii* were not as the name might ſeem to import, *Quæſtors* or *Treafurers* of the army, but representatives of the very loweſt orders.

(11) The votes on Milo's trial ſtood thus :

Condemned by	Acquitted by	
Senators 12	Senators 6	
Equites 13	Equites 4	
Trib. <i>Ær.</i> 13	Trib. <i>Ær.</i> 3	
38	13	Total 51
30 challenged make 81.		

VOL. II.

H

But

But in all these modes of appointment, there is no reason to suppose that the Judices or Jury thus chosen, were well if at all qualified to judge of matters of law, or versed in legal science.

And though I have been hitherto speaking of criminal cases, we shall see little reason to expect more legal knowledge in those of a civil nature.

The Juries, or if that name be not approved, the assistants of the Prætor, were according to Kennett (12) of three sorts, Arbitri, who were appointed to determine in some private causes of no great consequence and of very easy decision, Recuperatores assigned to decide controversies about receiving or recovering things which had been lost or taken away, and Centumviri who tried causes of a superior order.

I think he has omitted an order of inferior Judices between the Recuperatores, and the Centumviri, or in other words, that all the trials above the cognizance of the Arbitri and Recuperatores were not *centumviralia judicia*. (13) Heineccius particularly observes that the *Judices selecti* did sometimes

(12) Roman Ant. tit. Book. 3. ch. 17.

(13) Centumviralia Judicia sunt, usu capionum, tutelarum, gentilitatum, mancipiorum, parietum, luminum, testamentorum

sometimes determine private causes, and proves it from a passage out of Suetonius. But it matters not to our present question. Certain it is that the most important civil causes, and those which required most knowledge and judgment, were reserved for the Centumviri. Now who were they? 150 men, (for the number did not answer exactly to the name) annually chosen, three out of every tribe, to decide private controversies. What reason is there to suppose that they were much greater lawyers, though they might be more respectable Jurymen, than their fellows?

We must then look to the presiding Magistrate, the real Judge, not called *Judex* indeed, but yet really and truly corresponding to the Judge on the Bench and not to the Jurymen, to give his aid and direction in point of law.

This presiding Magistrate was properly the Prætor (14), but as the Prætors, though their *testamentorum ruptorum, aliorum que hujus generis. Cic. de Or. c. 1. 38.* These Centumviri were divided into chambers, like the Roman Rota in modern days, for trying each its own particular species of causes.

Judex Pedaneus was so called because in *subsellis* & *quasi ad pedes Prætoris sedebat.*

(14) The people at some periods might choose judges in criminal cases distinct from the Prætor, called *Quæstiores Paracidii.*

number was latterly encreased, could not possibly preside at all trials, they appointed deputies both in civil and criminal cases, viz. in the former the Decemviri litibus Judicandis, and in the latter a Judex Quæstionis. (15) The Decemviri were chosen out of those who had been Quæstors, the Judex Quæstionis out of those who had borne the Ædileship, but as we can see no reason why the Quæstorship or Ædileship should require or give a general knowledge of law, and as the Prætorship being annual his deputies must have been also, the difficulty is not much removed.

The only way which occurs to me of accounting for the possibility of the existence of the judicial power without standing Judges learned and experienced, is by supposing, that in a military state little acquainted with commerce, few laws and simple controversies required no great knowledge to decide them, and that the decisions were often like those of the Turkish Cadi, if honest, governed chiefly by the good sense

(15) At Milo's trial, it happened from the particular time of the year, that there were no magistrates elected, and Pompey vested for the occasion with extraordinary power himself appointed the Judex Quæstionis for that cause.

of

of the individual ; a supposition rendered more probable when we reflect, that in the earlier times of Rome, every Prætor made his own Code, and published at his entrance into office, the rules, regulations and maxims of justice which appeared to him proper to be followed in the ensuing year, until in more improved times he was obliged to attend to precedent, and the Jus Prætorium became a permanent Code.

In the times of the Emperors, we find these Judices selecti, gradually going into disuse,—the power and authority of Juries neglected and despised, and gradually all judicial authority vesting in the Magistrate or Judge of the Bench alone, and these magistrates ultimately becoming permanent like our own tribunals, as will appear from the following extracts from a passage in the Novellæ, 82. 1. “ Vetus schema
“ Zenonis omnino perimimus—eligere vero per-
“ speximus—qui communes omnium erunt Ju-
“ dices, and a little after it says, “ Quia vero
“ competens est esse etiam majores aliquos dig-
“ nitate provectos, experimento causarum mul-
“ tarum aut plurimi temporis exercitatos. ideo
“ perspeximus

(16) Before the age of Justinian, or perhaps of Dioclesian, the decuries of Roman Judges had sunk to an empty

“perspeximus &c. (16) *Judex* here plainly signifying Judge of the Bench, for it is said in the next chapter, “*Judices itaque post nos-
tros administratores hos esse volumus, & his
negotia delegamus.*”

These trials were either more or less solemn, the former *pro tribunali*, the latter styled *de plano*, being decided by the hasty signature of the *Prætor* at his own house, or in the public way without any formal decree, upon mere petition (17). In the more formal trials, the party proceeded by regular forms of action according to the nature of his case, which calls upon us to give a general view of the Roman actions.

They were divided in the first place into real, personal and mixed. *Real* actions, otherwise called vindications, were those in which a man demanded some certain thing that was *his own*; and were founded on dominion or *Jus in re*. Personal actions, denominated also *Condictions*, were those, in which a man demanded

empty title, and in each tribunal the civil or criminal jurisdiction was administered by a single magistrate, who was raised or disgraced at the will of the Emperor.

GIBBON.

(17) It is a great mistake to think that causes heard *de plano* included all summary proceedings. Some of those *pro tribunali* were also summary, so that *de plano* and *summatim* are not synonymous.

what

what was barely *due* to him, and were founded on obligation, or *Jus ad rem*. Mixt actions were those in which some specific thing was demanded, and also some personal obligation was claimed to be performed (18).

Real actions were either *civil* or *Prætorian*. The former were *Rei Vindicatio* properly so called, and the *Actio Confessoria & Negatoria*. The first supposed property in the plaintiff, possession in defendant, and required a previous decision as to the possession *pendente lite* (19). The second and third were intended to be applied to incorporeal things, the first claiming a service in another's estate,

(18) I have taken this first paragraph from Halifax, because it is impossible to express the distinctions more clearly or better.

Real actions with us have a more limited meaning, as confined to *real* estate a distinction of property unknown to the Romans.

(19) The whole conduct of the action called *rei vindicatio* may be seen in Cicero's Oration for Muræna.

This distinction between the *Petitory* and *Possessory* suit is worthy of remark by those who wish to investigate the origin of our possessory bills.

The determination of the possession in the intermediate time is often illustrated by the story of Appius and Virginia, who in flagrant violation of all principles of law, decreed that possession in favor of slavery.

The

estate, the other denying that his own was liable to a service or *servitus*.

Real actions being directly or properly given by the law for the revindication of those things only, in which a man had a vested property or dominion, the Prætor was obliged to lend his aid in many cases, for instance, by the *actio Publiciana* if a depositary or trustee lost possession of a thing, (in which in time, he would have acquired a property,) before the property accrued.—*Recissoria* to guard the rights of persons in an enemy's prison or beyond sea, and rescind prescriptive claims set up in their absence.—*Pauliana*, where a debtor had disposed of any thing to defraud his creditors, (20) and *Serviana* to recover a distress eloigned, actions deriving their names from the various Prætors who were the authors of them.

If incident questions arose, which must be determined previously to the main question,

The meaning of a *servitus* has been illustrated in the former volume. It may be further exemplified by parishioner's *right* to bury in the church yard, though the freehold be in the parson: that is, a *service* from a thing to a person or persons.

(20) This answers to our statute against fraudulent conveyances.

they

they were tried in actions also ranged under the head of real, and termed præjudicial actions, as for instance, whether the plaintiff was a slave or a bastard (21).

The personal actions of the civil law, as Mr. J. Blackstone observes, were of the same nature with ours, they arose from contracts or torts, either legally or equitably. To recount them, seems to me, at this day, an idle and superfluous task, but curiosity may be satisfied by recurring to the brief but clear analysis of them made by Bishop Halifax. I will content myself with explaining the names of one or two of them, which even now not unfrequently occur to learned readers.

Condiçiones or condictitious actions took place when new laws introduced new obligations, without prescribing the particular suit or mode of enforcement. The *actio in factum* or *præscriptis verbis*, which may properly be construed an action on the case, has already been explained (22).

Restitutio

(21) These may be compared partly to pleas in abatement, partly to issues out of Chancery. Bracton speaks of præjudicial actions, lib. 3. cap. 4.

(22) As applied to *innominate* contracts. See Vol. I. Lec. II. *Præscriptis a Jureconsultis quum nulla formula*
VOL. II. I darentur

Restitutio in integrum was to rescind the contracts of minors, or such as had been made through force or fear. *Ex mutuo—commodato, deposito, locati conducti—empti venditi,—Pignoratitia* explain themselves by the names of the contracts from whence they sprung, and in many of these cases there was not only a direct, but a contrary action, that is, the defendant had his action. E. G. the depositary against the depositor, to indemnify him for any expences incurred.

Of mixt actions the most remarkable mentioned are the *Communi dividundo* and the *Finium regundorum*, of partition, and boundaries, (23) and they were so, because the Prætor might instead of assigning the land give if he chose a pecuniary compensation and remedy against the person, but why this was more peculiarly the

darentur a Pontificibus vel prætoribus. If it were worth the time many resemblances might be shewn between condictitious actions and some of ours: thus *Condictio indebiti*, was *assumpsit* for money paid by mistake.—*Condictio causa data non secuta*, *assumpsit* to recover back money, where the consideration happened to fail.

(23) *Familia ereiscundæ* and *Heridatatis aditio*, when a stranger kept possession against the heir, were also mixed actions.

case

case in these particular questions about landed property, doth not seem so clear.

The next grand division of actions was into those *bonæ fidei*, *stricti juris*, & *arbitrarias*. In the second instance the Court was legally confined to the strict words of the contracts or agreements;—in the first with more latitude could judge what was the real equity of the case;—in the last, if the defendant refused to listen to reason, the Judge was allowed to punish his obstinacy by decreeing more than the sum even equitably due. Indeed the actions *bonæ fidei* & *arbitrariæ* seem to have been decided by arbiters, *Arbitri*, and not by the *Judices*.

Actions were again divided into persecutory of the thing, or penalty, or both. By the first were meant all real actions, and all personal founded in contract; by the second those founded in tort; by the last such in which some thing was recovered, and also a penalty imposed on the defendant, as the action *de vi bonorum raptorum*.

The distinctions of actions into such in which double, triple, and fourfold damages were recoverable. or in which less than the sum due was recoverable, as for a dividend of a bankrupts effects, are of less importance. As actions might be founded in contracts entered into not

only by the man himself, but also by those under his power, as his son or his slave, this gave rise to another distinction of them, and as such persons might also commit wrongs for which the father or master were answerable, the class of *noxal* actions originated from thence.

The distinction of the *actio directa & utilis*, is familiar and plain; the former sprung from the direct words of a law, the latter from its equitable interpretation.

The last distinction I shall mention, is into perpetual or temporary; the former were so called because at first there was no statute of limitation affecting them, though they were afterwards confined to *thirty* years, which seems to have been the longest limit allowed for bringing any action; as to temporary in many cases the limitation was shorter even down to *three*, and those favouring of a criminal nature were confined indeed to *twenty* at the most. *Prætorian* actions at first must have been brought within a year, but afterwards the time was regulated by analogy with those called *Civil*.

The method of proceeding in criminal cases was threefold, by inquisition, accusation, and denunciation, names and modes of proceeding
also

also familiar to the Ecclesiastical Courts in modern times.

Inquisition was an act of the Judge making enquiry by virtue of his office in general, or upon common fame existing among credible persons, and was either general or particular.

Accusation was a solemn charge of a crime, in order to public punishment, preferred to a Judge by a private accuser.

Denunciation, was the delation of the charge to a proper tribunal, by persons peculiarly called upon by their offices to inquire into the existence of crimes (24).

It was my intention to have proceeded in the next place to the history of a Roman suit and the practice of the ancient civil law, and with that discussion to have terminated these labours; but feeling upon reflection that a subject so immediately illustrative of the practice of modern Ecclesiastical Courts, would more properly and use-

(24) Denunciations, such as presentments of offences by churchwardens and questmen are almost out of use with us; the two other modes of proceeding are familiar under the names of the *mere office*, and the *office promoted*. The name of inquisition seems to have gone into disuse, through detestation of the vile use made of it by certain foreign ecclesiastics.

fully

fully find its place along with the treatise I have promised upon that head, I shall here conclude this compendium, which I trust will be an useful, and from the difficulty of compression of such vast materials has certainly been to me a laborious selection of those points which appeared most worthy of notice in modern days.

ok III:

I have
clude
n use-
ion of
me a
peared

ECCLESIASTICAL LAW.

LE-

THE following Epitome of certain branches of the Ecclesiastical Law doth not purport to repeat what hath been often said before, but to convey useful knowledge upon points hitherto crudely digested, or in general imperfectly understood; particularly on some that are peculiar to the laws of Ireland, which yet will not be uninteresting to the English Civilian, who is frequently consulted from that kingdom.

ECCLESIASTICAL COURTS.

AND

CERTAIN BRANCHES

OF THE

ECCLESIASTICAL LAW.

Chapter the First.

OF THE COURTS ECCLESIASTICAL.

IT was for a long time a favourite object with me, to frame a work upon Ecclesiastical Law more useful, less mechanical, and more applicable to the meridian of Ireland than those previously extant; I had flattered myself that from my peculiar studies, and the documents to which I had access, it might have been rendered accep-

VOL. II.

K

table

table to the public. The discouraging weight of expence (1), the long delay of returns for biblical sales in this kingdom, and my extreme aversion to subscriptional aid and solicitation stifled the design, and determined me to add to some lectures upon Civil Law, certain sketches of practice in the Courts Christian, and Hints to the Clergy upon questions, on which I have found them most frequently at a loss, and which from the difficulties I experienced, and queries I encountered when a novice, I am apt to think it would be most acceptable to them to resolve. The mere Digest of Acts of Parliament left by Bolinbroke an *indigesta moles* is useful.

(1) A work of this kind costs in publication two hundred pounds. The emoluments of Lay Fellows are inferior to those of Ecclesiastical, and the Professorship of Civil Law by some unaccountable oversight in the Statutes is worth only 40l. per annum, while every other in the University is worth 100l. The College by annual premiums doth that justice to the Professorship to which it is truly if not strictly entitled. The publication could claim only favor, but it was thought as the Author understood, that the College had no power to apply its funds to encourage original undertakings, but only compilations or editions of books read in the course, or published for the immediate use of the Students.

COURTS,

The principal Ecclesiastical Courts are the Pre-rogative and Consistorial which are permanent, the Court of Delegates which is occasional, the Court of Arches, the Court of Peculiars, and the Archdeacons Court.

The Court of Arches, as far as it is held by virtue of the authority of the Dean of the Arches has jurisdiction only over thirteen peculiar parishes belonging to the Archbishop of Canterbury in London. As far as it is held by the principal official of the Archbishop, differs not I conceive from the Consistorial Court of the Abp.

The Court of Peculiars is only a branch of the Court of Arches, having jurisdiction over all those parishes through the province of Canterbury in the midst of other dioceses, which are subject to the metropolitan only. Neither the Court of Arches, nor Court of Peculiars exist therefore in the kingdom of Ireland, nor have I heard of any Archdeacon here claiming jurisdiction except in one instance (2).

(2) This was the case of a late Archdeacon of Dublin, who did attempt to set up such a jurisdiction against the Archbishop, but soon relinquished it.

The

The Prerogative and Consistorial Courts therefore require our particular attention, together with the Court of Delegates, to which lies the ultimate appeal from both.

Consistorial Courts.—The Consistory Courts are those belonging to every Diocesan Bishop, and have been held from time immemorial for the trial of all civil causes within their respective dioceses, and from the courts of suffragan Bishops there lies an appeal to the Court of the Archbishop of the province, which as far as respects the Archbishop's own diocese is his Consistory Court, as far as respects his suffragans is a Court of Appeal.

Prerogative Court.—Many of the Prerogatives of the Archbishop of Canterbury seem to be derived from the Legatine power annexed by the Popes to the Metropolitan of Canterbury. He was Legatus Natus, an honor annexed to very few Archbishopricks, according to Godolphin indeed, only to York, Pisa, and Rheims. From hence Sir W. Blackstone derives the origin of the *options* which he hath in the dioceses of his Suffragan Bishops, and from hence also he was enabled to summon any person out of any diocese whatsoever, into his Court of Arches (3),

(3) This is sometimes called the Prerogative Court of Arches. See Dyer.

or

or Court of Prerogative, until restrained by the statute 23 H. VIII. ch. 9. (4) which however made a special saving for the probate of testaments and granting administrations in case of *bona notabilia*, in its 5th section.

This act then recognizes this prerogative of the Archbishop of Canterbury (which is as old at least as the time of Lyndwood) (5) and confirms it, calling it expressly the prerogative of the Archbishop, which I suppose originated in the

(4) See *Lynch v. Porter* 2 Brownlow, p. 3. an anonymous case, 2 Brownlow, p. 38. 8vo. *Jacobi in C. B. Smith v. the Executors of Poyndrell Cro. Car.* 97. *Porter v. Rochester*, 13 Co. p. 4.

(5) Probably much older. *Hodie autem*, says Lyndwood, in *Anglia, Archiepiscopus Cantuariensis in sua* "provincia, tam quoad commissionem administrationis bonorum, & auditionem computi, omnia talia expectat, ubi decedentes habuerunt bona notabilia in diversis diocæsis suis provincie.

"LYNDWOOD'S PROVINCIALS, p. 174."

Lyndwood flourished in the reign of Hen. VI. The jurisdiction of Wills was not given to the Spiritual Courts till the reign of Henry II. that is about 270 years before Lyndwood; and Swinburne says, part 6. sec. 11. p. 439. that it was not always so, but that by composition or some other agreement which is now run into a prescription, the prerogative of granting administration in such cases is vested in the Archbishop: so

*

late

the Legatine power (6), and therefore would have expired at the reformation, if it had not been re-established by virtue of this act, which was passed two years previous to the Act of Faculties, and three to that declaring the King Supreme Head of the Church.

Whether any similar prerogative existed in Ireland before the reformation, after the most diligent search I am not able positively to pronounce. I see by reading Sir James Ware's most valuable Work, as edited by Harris, that there was no Legatine power known in Ireland until a late period, and that the first that existed was in a Bishop of Limerick (7); and it seems only *occasionally* to have existed in the Archbishop of Armagh (8).

late as the reign of Edward I. he had no such prerogative, as appears by the Provincial Constitutions, see Reeves, Vol. IV. p. 77.; he had it, says Sir L. Jenkins from the year 1200 *in his own immediate hands*, but did not delegate it, nor was there a standing Prerogative Court till Archbishop Dene's time, reign of Hen. VII. Vol. II. p. 658.

(6) There were three sorts of Legates—those *Nati* as above—*Dati*, appointed pro tempore, by special Commission, and a *Latere*, Cardinals sent a *Latere* of the Pope, and these legates might cite any man out of his diocese. See Brownlow, 2 part, p. 3. Co. Rep. p. 13. p. 4.

(7) See Sir James Ware. Vol. I. p. 31.

(8) See Sir James Ware. Vol. I. p. 21. 38.

And

And in all the disputes about the Primacy of Ireland between the Sees of Armagh and Dublin, and the violent contests not unattended with bloodshed between them as to the right of elevating the cross in the other diocese or province mutually, I do not find a word mentioned of the Prerogative Testamentary Court (9).

However

(9) This distinction between the Courts of Prerogative in England and Ireland before the Reformation, is however, mere matter of curiosity. I speak of it with deference, because I apprehend that I differ in opinion here from lawyers of great and deserved authority in this country: my additional reasons for persisting in this opinion are, that the Archbishop of Canterbury's Prerogative originating in his being *Legatus natus* does not pervade the province of York, whose Metropolitan was also *Legatus natus*, see Swinburne, p. 440. 42. sec. 86; But the King's Prerogative, which is what is deputed to the Primate of Ireland by virtue of statute law originally and only, pervades all Ireland. 2. It is said by them of old time that if a man has bona notabilia in Ireland, and also in England, probate shall be granted by the Archbishop of Dublin in Ireland, and by the Archbishop of Canterbury for the goods in his province, Rolle's Abridgement, 908. l. 40. 2 lec. 86. Comyn's Dig. Administration, B. 3. and as Rolle quotes a decision in 14 Eliz. antecedent to the letters patent granting this prerogative to the Archbishop of Armagh, from thence

*

I collect

8 ECCLESIASTICAL COURTS.

10 However this be, certain it is that the Court of Prerogative in Ireland at present depends upon and is derived from the authority vested or at least recognized in the Crown by the statute 28 Hen. VIII. ch. 5 and 13. and 2 Eliz. ch. 1. and carried into act by the instruments mentioned in

I collect that at that time this prerogative was claimed by the Archbishop of Dublin, and perhaps by every other Metropolitan within his own province.

3. Because it appears to me from reading some instruments at the Roll's Office that at one time this prerogative was deputed by the Crown to certain Lay Commissioners, viz. Sir Am. Forth, C. Doyme, and T. Ryves, and totally distinguished from any Episcopalian Power.

4. From the different stile of the Courts, the one being only stiled *A. B. by Divine Providence, Archbishop of Canterbury, Primate and Metropolitan of all England.* The other, after using correspondent words, adding *Judge or President of his Majesty's Court of Prerogative for causes Ecclesiastical and for Faculties throughout the whole Kingdom of Ireland, by royal authority, lawfully constituted,* from whence I collect that the power of the Archbishop of Canterbury or York in this Court is Ordinary, of the Primate of Ireland Delegated; In short the statutes in England, without referring to the Crown preserved the Archbishop's powers, those in Ireland only empowered the Crown to grant such powers *de novo.*

5. Because we have no Options in this country, nor power of granting degrees in the Primate, both which in England have arisen from a Legatine power.

*

6. Books

the note below, which may be found in the Rolls, docketed as there marked (10).

Court of Delegates. By the statute 25 Hen. VIII. chap. 13, in England, appeals to Rome being prohibited, it is ordained that for default of justice in any of the Courts of the Archbishop of the Realm of England, it shall be lawful to appeal to the King in his High Court of Chancery, and thereupon a commission shall be granted, and the Court grounded on such Commission is called the Court of Delegates.

6. Books of Report and Statutes in England always call it the *Archbishop's* prerogative, thus 24 Hen. VIII. ch. 12. sec. 8. Not so here.

(10) 1. Privy Signet granting the office of Prerogative and Faculties to the Primate. Westminster, 23 Feb. 1621. 20. Jac. 1. 1st part Dorso. 2.

2. Grant of said offices. April 10. 1622. *ibid.*

3. Commission to exercise the Jurisdiction of Prerogative *fede vacante.* Feb. 8. 1624. 22. Jac. 1. 2d part fac. 20.

4. Grant of power to appoint a Deputy, Surrogate, Commissary, Register and other officers. Jan. 6. 1626. 2 Car. 1. 2d part Dorso 33.

5. Power to appoint Judge and Register. June 19, 1632. 8 Car. 1. 1st part Dorso. 20.

6. Privy Signet, for a grant of the fourth part of the taxes and faculties to the Judge of the Prerogative Court St. James, 16. Feb. 1727. 1 Geo. 2. 4th part fac. 5.

7. Grant of the same. March 21. 1727. *Idem. Idem.* 5.

VOL. II.

L

By

By the statute 29 H. VIII. ch. 6. in Ireland, called the Act of Appeals, after forbidding appeals to Rome, it is ordained, that upon appeal made to the King of England in his Chancery of England, the Chancellor there—or upon appeal to the Lord Lieutenant of Ireland, the Chancellor here, with the assent in the latter case of the two Chief Justices, the Master of the Rolls, and Under-Treasurer of Ireland, may grant a Commission of Delegacy for final determination of all causes and griefs contained in such provocations, and appeals.

Thus the law continued, though not the practice, till 1788, when by the statute 28th of Geo. III. chap. 32, both law and practice were made to unite, by giving the appeal to the King in his Court of Chancery in Ireland, and enabling that Court to grant Commissions of Delegacy, without any exterior assents whatsoever. (11)

I shall conclude this chapter by defining some of the offices best known to the Ecclesiastical Courts.

A Chancellor has cognizance of all causes both of voluntary and contentious jurisdiction. (12).

A Vicar

(11) See Statute 28 G. III. ch. 32.

(12) See Ayliffe Par. J. C. 160. and p. 163. and also Burn, Vol. I. title Chancellor: all these offices are in Ireland usually granted together to the Judges of Consistory Courts, though sometimes separated.

Voluntary

A *Vicar General* of all causes of voluntary jurisdiction only.

A *Principal Official* of all causes of Contentious Jurisdiction only.

A *Commissary* only of particular matters, limited by the Bishop's Commission in their subject, or confined to some particular part of the diocese.

But in first Lord Raymond, p. 488, another distinction is made, and it is said that the Vicar General in a Province is of the same nature as the Chancellor in each particular diocese, and that the Dean of the Arches is the Vicar General of the Archbishop in all the Province; and Ayliffe admits that in Common Parlance, these distinctions are not accurately observed, and that Vicar General and Chancellor are often synonymous, though properly speaking faith Burn, Chancellor includes both Vicar General and Official.

In England, the Judge of the Consistoria Court is commonly stiled Chancellor, in Ireland Vicar General.

Voluntary Jurisdiction is exercised in matters which require no judicial proceeding, as in granting probate of wills, letters of administration, sequestrations, institutions and such like.

Contentious Jurisdiction is, where there is an action or judicial process, and consisteth in the hearing and determining of causes between party and party.

*

The

The power of appointing a Surrogate or Deputy is inherent in a principal Official, Chancellor, or Vicar General, because they are Ordinary not delegated Judges, for from them no appeal lies to the Bishop, but to him only to whom it ought to be appealed from the Bishop himself, but a Commissary can have no such power for *Delegatus non potest Delegare* (11).

To understand this seeming contradiction, that a person deputed by another, such as the Judge of an Ecclesiastical Court, shall have Ordinary power, we must conceive the whole power emanating from the Bishop to his Vicar General, so that the latter becomes as it were identified

(11) I once heard the question asked in a remarkable case, what power have Bishops to appoint Surrogates? and it was argued that a Surrogate could not act, unless the Vicar General was absent, which he did not appear to be in a certificate made to obtain a writ *De Excom. Cap.* I can only answer as above, and that they are mentioned by the Canons, and recognised as legal Officers by Act of Parliament, E. G. the statute of 26 Geo. III. ch. 33. English; and that by the known rule of the Canon Law, all ordinary judges could delegate, and the Pope's delegate could even sub-delegate, and therefore I imagine the Archbishop of Canterbury wanted no special power to appoint a Deputy as Judge of the Prerogative, the statutes generally retaining to him all his old powers, the Primate of Ireland did. See p. 9.

with

with the former, and the acts of the Court are the Bishop's acts, although he cannot sit therein, and no appeal lies from the Judge but as it would from the Bishop, to the next superior: For though he is created by the Bishop, his office is by the law, for the Bishop *must* have a Vicar General,

It must be owned, however, that the cases seem contradictory on the subject.

In the case of the Bishop of Lincoln v. Smith. 1 Ventris p. 3. the Bishop sued before his own Chancellor, and it is held, 3 Mod. 334, that the Bishop having appointed a Dean of the Arches cannot come in, and sit in that Court himself. It is said that if a Bishop doth not constitute a Chancellor, he may be obliged to do so by the Archbishop, Gibson 926.

In the case of Lucy v. the Bishop of St. David's, the citation was to appear before the Archbishop or his Vicar General, (14) and there it said that the power of a Chancellor or Vicar General is only delegated in case of the Bishop, and the Bishop may sit Judge himself, 2 Salk. 134. and in the case of the Bishop of Cloyne, Holt said the Bishop, as he thought, might sit in Court, 11 Mod. 62.

To reconcile these apparent contradictions, Bi-

(14) 1 Lord Raymond 448.

shop

shop Stillingfleet takes great pains to prove that the Ordinary power in a Chancellor or Vicar General is only that of hearing causes, for although, says he, such an officer hath the same Court with the Bishop, so that the legal acts of Court are the Bishops acts, yet by his Commission no authority passes except that of hearing causes, but all acts of voluntary jurisdiction require a Special Commission,

Dr. Burne and Dr. Bullingbroke seem fully satisfied with this explanation by Bishop Stillingfleet, which yet in my humble opinion, will not do, for I apprehend the case of the Bishop of St. David's, was not a case of the voluntary jurisdiction.

The result of the whole I should rather apprehend to be, that by a General Commission to a Vicar General the contentious jurisdiction only is conveyed, and that though by the Special Commission, (and all such Commissions I believe are now Special) the Voluntary Jurisdiction is conveyed, yet that in matters of correction and visitation particularly of the Clergy, the Bishop retains at least a Concurrent Jurisdiction: and accordingly it is said in that case of the Bishop of St. David's, that the Archbishop might have cited him either before himself in person, or before the Vicar General,

The

The case of the Bishop of Cloyne above-mentioned, seems to have turned on the question whether he could recall the commission of his Vicar General, which leads me to consider how far that is revocable.

A judicial authority remains in Ordinaries to suspend their Chancellors or Vicars General for crimes, (15) and they may grant the offices at pleasure or during life, in which last case they are not revocable by them, but are not good against the successor, unless confirmed by the Dean and Chapter (16).

These offices in England cannot be bought or sold, being comprehended under the Statute 5 Edw. VI. (17) against buying and selling offices concerning the administration of justice, nor did I ever hear of any such practice in this kingdom.

By the Canons, a Chancellor, Commissary, Official, or Surrogate must be of the age of twenty-six years at the least, a Master of Arts, or Batchelor of Law, learned in the Civil and Ec-

(15) See Bullingbroke's Ecclesiastical Law, p. 1287.

(16) See Burn's Ecclesiastical Law, tit. Chancellor.

(17) See 2 Cro. 269. 12 Rep. 78. and in this last case, Lord Coke expressly extends the same rule to the office of *Register*. Is it not surprising that such a Statute as that of Edw. VI. has not been enacted in Ireland?

16 ECCLESIASTICAL COURTS.

clesiastical Laws, and reasonably well versed in the practice thereof. (18).

I have omitted to speak of the Archbishop of Canterbury's Court of *Audience*, where formerly *Auditors* prepared evidence and other materials to lay before the Archbishop, that he might there decide upon all such matters as he thought fit to reserve, whether of contentious or voluntary jurisdiction for his own hearing, but this Court is now united to the Court of Arches. We have no such Court in Ireland, though formerly it should seem that every Bishop had such a Court (19).

There are also peculiar, or exempt jurisdictions with respect to probates, and administrations to a certain value, which Deans and Chapters have by ancient composition from Bishops, such in England are St. Pauls, York, and Lichfield, and such I am told in Ireland has the Dean of Lismore.

(18) Can. 127. in England—76 Ireland. We find in the books, two cases of Chancellors of dioceses libelled against in the Spiritual Courts for ignorance, and application for prohibitions on the foot of freehold. See Gibson, 987. 4 Mod. 31. and prohibition refused, notwithstanding a confirmation by Dean and Chapter.

(19) See the Code De Episcopali Audientia.

Chapter

Chapter the Second.

OF A ROMAN SUIT, OR ITS CONDUCT
BY THE ANCIENT CIVIL LAW.

THE history and analysis of a Roman suit is interesting, as it may in some instances elucidate and explain points of modern practice not derivable from any principles of modern laws, and in fact without some knowledge of it, as well as of the Practice of the Canon Law, that of the Modern Ecclesiastical Courts is unintelligible: thus in the Ecclesiastical Courts it does not appear why a Proctor doth not become *Dominus litis*, and cannot appoint a substitute until after contestation of suit, unless we are acquainted

with the principle of the old Roman Law, that no man could act or appear for another in a Court of Justice, (1) and know that the fiction of the *Dominium litis* was introduced to get rid of this most inconvenient maxim. And in Courts of Equity the structure of a bill and its repeating the same story twice, first in the shape of assertion and then in the form of interrogation, will appear unaccountable to him, who is unacquainted with the old Canon Law practice as to the positions and the articles (2). Nor will it appear much more than an arbitrary distinction when a man is told, that he cannot in strict practice after issue joined amend his bill, though he may file a supplemental one, (3) although all the proceedings are carried on before

(1) *Generalissima erat Regula Juris, per extraneam personam nil adquiri posse: hinc nemo pro alio agere poterat in Judiciis* vid. Heinec. Antiq. lib. 4. tit. 10. sec. 2.

(2) This shall be presently explained. It is remarkable that this superfluous tautology has been corrected in the Ecclesiastical Courts and not in the Courts of Equity, for in the former the personal answer of the party is demanded to the assertions and charges of his adversary without putting these into the form of interrogation.

(3) See Howard's Equity Side of Exchequer, Vol. I.

p. 269.

before one and the same Judge, till he knows that the bill in Chancery is derived from the Prætors' forum, where after contestation of suit the Prætor could not amend, because the cause was gone from him to a different tribunal, viz. to the *Decemviri Lit. Jud.* and the *Judices*, and he had nothing before him to amend; nor could they amend or alter any more than a Judge or Jury at Nisi Prius could alter the issue sent to them to be tried. I mention these only as the first instances that occur.

The authors from whom this knowledge must be derived give us little insight into the written pleadings and proceedings of antiquity, and usually speak as if all things were transacted *ore tenus*, in little short formulæ such as took place amongst our ancestors in earlier times: on such scanty information therefore we must build the best superstructure we can.

The suit began by summoning or arresting the person of the defendant, and bringing him before the Court; this the Plaintiff did by his own private authority, without any writ, (4) provided he

p. 269. this is now reduced to a more rational principle, that he cannot amend after publication. See Mitford, p. 53. and 258.

(4) This was the case at least, until after the age of

he found the defendant abroad, for every man's house was his castle and he could not be taken within his own door. If he lay hid within his own house, instead of a *latitat* a *public edict* was put up upon his door demanding his appearance, which being thrice repeated, if not obeyed in the third instance, a decree went against his goods and property. (5)

When the plaintiff made his caption of the defendant, he called the persons present to witness the fact, which was stiled *Antestari*, unless he made it up with his adversary on the way. (6) The Impugnant appearing before the Prætor, the Plaintiff chose his form of action, and applied to the Prætor to permit him to proceed in that form, which was called *postulare actionem*, and then the plaintiff or *Actor* *dabat actionem* and gave notice to the defendant of its nature and cause, and the defendant gave bail (7) *vades*,

vadi-

Pliny, vid. Pliny's Panegyrick, cap. 36. but afterwards in the days of Paulus and Ulpian an authority from some Court was required to arrest or summon any person.

(5) Like our distress infinite of old.

(6) Horace Satir. 9. *Licet antestari?*

(7) Which may be compared to the bail to the Sheriff, as the *pactum* or *transactio*, the making it up on the way

vadimonium. to appear (8) *die perendino* the day after the morrow.

This rude and barbarous method of dragging the Debtor *Obtorto Collo* before the Magistrate, by the mere authority of the party, unassisted by any legal officer (which as Heineccius shews by quotations from Aulus Gellius was often attended with the greatest cruelty) existed according to the same author until after the time of Pliny: but before Justinian's days, a more rational one was introduced, and the Defendant was summoned by the apparitors or officers of the Court. He was also to be cited thrice by three *simple* citations, with an interval of at least ten days between each citation, and then a *Peremptory* issued (9). And the Defendant was not

way of the *Scripture*, may (and is by Blackstone) to an Imparance. Mr. Reeves and Mr. Cruise say it reminds them of the *fine*, in the early parts of our history; the leave *interloqui* in interrogatory actions was more like an Imparance.

(8) Our period is less limited, the *quarto die post*, which I have heard in legal declamations ascribed to the sturdiness of our ancestors, who would not be obliged to appear directly, as if some such delay was not known to all laws.

(9) Ad Peremptorium edictum hoc ordine venit,
“ ut primo quis petat post absentiam adversarii edictum
primum

not truly contumacious till after the Peremptory was served; (10) or otherwise one only citation issued, and that a peremptory to summon the party to appear at a distance of time equal to what three simple citations should contain, and if he was contumacious a *Primum*

primum, mox *alterum* per intervallum non minus decem dierum, et *tertium*, quibus propositis tunc *Peremptorium* impetret. In Peremptorio autem Comminatur is, qui edictum dedit, etiam absente diversa parte Cogniturum se, and pronunciaturum. Nonnumquam autem hoc edictum post tot numero edicta quot præcesserint datur. Nonnumquam post unum vel alterum; Nonnumquam statim quod appellatur *unum primum omnibus*. hoc autem æstimare oportet eum qui Jus dixit, & pro conditione causæ vel temporis, ordinem edictorum vel compendium moderare." Dig. lib. 5. tit. 1. from 68 to 72 inclusive. See also Heineccius, on the Pandects, part 1. Sect. 281, and his Antiq. Vol. II. pag. 304. and Ayliffe's Parergon Juris Canonici, p. 176.

(10) *Vere Contumax* says Gothofred in his note on the 5th book Pandects 70. In our Ecclesiastical Courts, as in the Canon Law, the first citation is Peremptory, so far as to make the party absenting himself contumacious, but he cannot be excommunicated till after three notices, as will be seen hereafter, but they are not like the Roman all originals, or mere repetitions of the original.

Decretum

Decretum issued (11), in real actions to take possession of his goods, and in personal to hold them in a sort of custody together with the owner, and in Personal Actions there was also a *Secundum Decretum* at the end of the year to give full property; in both cases if the Defendant came in within the year, purged his contempts, gave security to abide the suit, and paid the costs, possession was restored to him, but not afterwards.

The party appearing at the appointed time, was to give security or bail to the action, and if he had a right to throw the *onus* upon some other person, to vouch him or call him in aid, which was termed *Laudatio*, and here, as in every other stage of the cause, *Feria* the intervention of a holiday, or *Dilationes* allowances of time granted by the Court upon just cause, might produce delay.

If the Defendant or Reus, appeared at the proper time, but the Actor or Plaintiff absented

(11) From hence the *first decree* in the Court of Admiralty, or provisionate decree for the possession of a Ship, See 1 Ventris 174. and Moor 814. as I deduce the *four defaults*, technical terms known to that Court, from the number of citations abovementioned; for that Court has exclusively followed the Civil Law, while the Ecclesiastical have been much affected by the Canon.

himself,

himself, (12) he was nonsuited. If he did not prosecute his action for a year, then at the end of that time, after three several summons, at the interval of thirty days each, he was non-prosd.

It should seem that a citation must be issued *de novo*, in any and every stage of the cause when a party absented himself, and hence Heineccius says, *Diversa ab hac in Jus vocatione, "est citatio cujus Jus nostrum meminit; illa enim initio litis, et semel fiebat."* (13)

If both parties appeared on the appointed day, each was to give security *stipulatio*, or *satisfactio*; the Plaintiff, that he would prosecute his suit, and pay the costs, if he lost his cause (14): The defendant, that he would
continue

(12) 112 Novell, c. 3.

(13) Heineccius in *Pandectas*, part 1, *De in Jus vocando*, and hence in the foreign Ecclesiastical Courts, the causes being Ordinary, no sentence could pass, if the party contumaciously absented himself, though in the Civil Courts, where causes were summary, they might; See the *Practica Judiciaria Joannis de Arnono* annexed to Maranta's Work, and the same practice introduced in our Ecclesiastical Courts produced infinite inconvenience, till remedied by the good sense of Judges, in the manner that shall be mentioned hereafter.

(14) In like manner, saith Sir W. Blackstone, as
our

continue in Court, and abide the sentence of the Judge, i. e. bail to the action (15), and

at

our Law still requires nominal pledges, Book 3. Comm. ch. 19.

(15) Much like our special bail, says "Sir W. Blackstone, but with this difference, that the *fide Jussores* " were there absolutely bound *Judicatum solvere*, to see " the costs and condemnation paid at all events, where- " as our special bail may be discharged by surrender- " ing the Defendant into custody within the time al- " lowed by law," *ibid.* Heineccius differs, at least as to later periods, for he says, " *Novo Jure reus, five in* " *rem, five personali actione caveretur, nunquam cave-* " *bat Judicatum solvi, sed tantum Judicio fisci.*

Antiq. Lib. 4. tit. 11."

Cautions or securitties were :

Judicatum solvi.

De Judicio fisci.

De Rato.

By the first, the futor engaged, if he lost his cause, to pay whatever sum he should be condemned in by the Judge.

By the second, he gave security to abide the sentence. And latterly, also to pay a tenth part of the sum in dispute, if defeated.

The third, engaged that a Principal would confirm the acts of his Proctor, or Agent.

VOL. II.

N

Cautions

at this time also (though that was frequently done too immediately after contestation of suit) the oath of Calumny was sometimes administered.

Security being given on both sides the Plaintiff preferred his action; in ruder times by a certain form of words to which the defendant was to plead *ore tenus*; in more improved by filing his libel to which the Defendant having first received a copy and subscribed the time of its reception, answered in writing in due time, i. e. at furthest within twenty days. (16)

The libel having been put in, the Defendant either confessed the Plaintiff's charge, or if he could deny generally its whole truth, he did so at once, i. e. he pleaded the general issue, which is the strict and original meaning of contesting

Cautions with respect to the manner in which they were taken, were

Cautio fide Jussoria, viz. by sureties.

Pignoratitia, by deposit.

Juratoria, by oath.

Nude Promissoria.

The first was the one generally in use, and called by way of eminence satisfactio, and is the one used in the Court of Admiralty on Defendants appearance, in nature of bail, though sometimes a juratory caution is there admitted.

(16) See Code lib. 3. tit. 9. Novell. 53. ch. 3.

the

the suit or the *Litis* (17) *Contestatio*.—If he could not make this denial, he put in an exception, or a defensive matter.

Of

(17) *LITIS CONTESTATIO*.

An exception could not make the *Litis Contestatio*, for we are perpetually told, that of exceptions some *must* be put in before Contestation of Suit, others might after, which would be absurd if they could be identified with it.

An issue joined on the truth of an exception, though it is called a Contestation of Suit, is properly a contestation of the exception or defence of the Reus, and not of the Plaintiff's suit or charge, for *lis* is the charge made by the Plaintiff. *Litem intendere alicui* to bring an action against some one, *in Litem Jurare* to swear to the truth of his complaint, *Litem capitis in aliquem inferre* to bring against one a capital charge, are all expressions of Cicero's. Besides, the common and vulgar trite definition of a *Contestatio Litis* is, that it is *Responsum libello*, and as I conceive for reasons which I shall mention hereafter, that the Ancient Roman Law knew nothing like special answers in Courts of Equity or the personal answers of the Ecclesiastical Courts, the answer could be nothing but a general answer—a general confession, or a plea of the general issue.

I acknowledge that in modern times this strictness has worn off, and in certain causes E. G. all summary

Of the characters of these pleadings,---little is said. We find in general that the libel ought to

ones, no strict contestation of suit is required: the suit is as it were contested, by the next contradictory act after the libel put in that concerns the merits of the cause, or to use the words of Maranta, "Primus actus qui solet immediate fieri post Litis Contestationem, in causis in quibus lis contestatur habet vim Litis Contestationis in causis in quibus lis non contestatur," i. e. as he observes in *all* causes in the kingdom of Naples, they being all summary, in which *omnia substantialia Judicii sunt sublata*; part 6. de Litis Contestatione. And thus Lyndwood says, "in speciali inquisitione vocabitur is contra quem proceditur, qui si veniens responderit, habebitur *pro* contestatione."

But see whether I am not justified by authorities as to the strict and original meaning of these terms; "Per responsum ad positiones," i. e. by a special, or what we call a personal answer to distinguish it from the answer of the Proctor, non inducitur Litis Contestatio says Gail Observ. 73. N. 7.

"Nequaquam per exceptionem peremptoriam Litis Contestatio intelligitur esse facta."

Sexti Decretalium, lib. 2. tit. 3.

"Exceptionis peremptoriæ, seu defensionis cujuslibet principalis, objectus ante Litis Contestationem, nisi de re Judicata transacta vel finita, Litis Contestationem non impedit. Ibid.

"Litis

to contain a *narration* and *conclusion*, to be *short* and contain nothing superfluous—*clear* so as to avoid

“ *Litis Contestatio* fit, per vel negationem, vel per confessionem, vel per verbum dubitativum; per negationem quando reus negat *simpliciter* narrata per actionem. Maranta, part 6. de *litis contestatione*.”

I think I can borrow aid from Sir W. Blackstone upon this subject, Vol. III. of his Commentaries, page 296. “ Defence, saith he, in its true legal sense signifies not a justification, protection or guard, which is now its popular signification, but merely an *opposing* or *denial* of the truth or validity of the complaint. It is the *Contestatio Litis* of the Civilians, a *general* assertion that the Plaintiff hath no ground of action.”

I have been prolix on this subject, because it may sometimes be important; in a remarkable cause, the Office *v. French*, tried before myself as Vicar General of Kildare, a question arising whether additional articles could be put in, the impugnant having answered those original, it was among other arguments against so doing insisted by very able and learned men, and said, though I thought erroneously, to be supported by a great living authority, that no addition, alteration or amendment could be after contestation of suit, that the suit had been contested, and that every *responsum libello* and even an *exception* formed a contestation of suit.

I was of opinion that in this case, which was a criminal summary proceeding there could be no *Litis Contestatio*,

avoid all ambiguity—*apt* i. e. that the prayer for relief should accord with the nature of the grievance, and sufficiently *certain* as to the quantity, quality, and nature of its subject matter.

From the accuracy, which as we shall presently see was used in *inscriptiones* or indictments, we may suppose it was not neglected in these declarations.

EXCEPTIONS.

It has been observed that if the Defendant could not contest the libel generally, i. e. plead the general issue, he must put in an *exception* or a *defensive* matter,

Exceptions

tatio, but that even if there could, an answer to articles did not make one, but was only, as Lyndwood says above, *pro* Contestatione—that the rule as to amending or adding being now a mere arbitrary one, no longer founded in reason, since the *Canon Law* a stranger to juries had fixed the same Judge for matters after as before contestation, it should be construed strictly with reference to the strict original meaning of the terms *Litis Contestatio*—and even that admitting this answer to be a contestation of suit, the old rule which forbade subsequent amendment or addition *to the libel* or articles had nothing whatsoever to say to *additional* articles or allegations, for reasons which shall be mentioned hereafter in ch. 4.

To

Exceptions were either *Peremptory* or *Dilatory*, the first barring, perempting, or destroying the Plaintiff's suit or cause of action; the latter postponing or delaying him.

To the former the Civilians add the epithet of *Perpetual*, to the latter of *Temporary*; perhaps not with perfect accuracy, since a perpetual bar may sometimes be pleaded in the shape of a dilatory; or to use our own technical phrase, the same plea may sometimes be pleaded, either in abatement, or in bar, E. G. outlawry: and besides a plea which is only dilatory as to bring-

To conclude, all the Commentators, and Lanfranck and other books of practice, say that *Responsum positionibus* or a personal answer is not a contestation of suit, and who ever heard that an answer in Chancery was a joinder of issue.

In common parlance, denying the truth of the Defendant's exception, or indeed wherever parties come to a direct affirmance on one side and denial on the other, is called a contestation of suit, and is sufficient to satisfy the rule that in all plenary causes there must be contestation of suit, because the Defendant by excepting becomes a *quasi* Plaintiff. *Reus excipiens actorem agebat* says Heineccius in Pandectas. *Qui exceptiones opponit actoris partibus fungitur*, Mascardus, Vol. I. Quæst. 17. 4. *In exceptionibus reum partibus actoris fungi oportere* Dig. 22. 3. 19.

ing

ing another suit, may be perpetual and peremptory as to the present.

To explain exceptions, we must understand that if the Defendant could alledge any thing by which the action that in strictness of law accrued to the Plaintiff, could be excluded evaded or escaped on grounds of law or justice, though it was not in strictness of speech taken away, he did it by way of exception; thus if he could *demur*, it was called an *exception*; so if he pleaded in bar *Exceptio doli Mali* that the promise had been obtained by fraud, or *pactum de non petendo* a release, or *Jusjurandum de non agendo* a covenant of the Plaintiff that he would not sue, all these pleas though they dissolved the natural obligation of the Defendant, did not dissolve the civil obligation *ipso Jure*, *sed ope exceptionis excludebant*.

Such were also the exceptions *litis finitæ, rei Judicatæ* and *transactionis* of a former final determination on the same point between the same parties (18), and of a compromise since the suit began.

If the plea was of a matter which took away the Plaintiff's action *ipso Jure*, such as a plea of

(18) *Res Judicata* is when it is beyond the reach of appeal or revision.

payment or satisfaction, it was called *defensio*, a *defensive matter*, and not properly an exception, for *exceptio* was “*actionis jure stricto competentis ob æquitatem exclusio* (19).

These distinctions being well understood, it will clearly appear why *dilatory* exceptions (among which are to be reckoned those *inepti libelli* or *Demurrers for want of form*) could not be admitted after contestation of suit, unless they had subsequently come to light—why some *peremptories* such as those *litis finitæ* took away the necessity of any contestation of suit, for they did not respect the merits of the cause (20), but enabled the Defendant

(19) See Heineccius ad Instituta, lib. 4. tit. 13. *Proprie dicitur exceptio quando actori competit actio, quia est actionis exclusio, quando autem actori nulla actio competit, id quod opponit reus proprie vocatur defensio.* Lanfranci praxis, ch. 4. de exceptionibus : but by modern Jurists the latter are called exceptions of fact, to distinguish them from the others which are called exceptions of law, for in its most extended sense the word *exception* included both, and was *omnis rei allegatio ac defensio qua intentio actoris vel ipso jure vel ob æquitatem eliditur*.

(20) *Merita causæ non respiciebant, sed actionem elidebant, et actorem a limine Judicii repellebant*, are the words of the *Civilians* and *Canonists*.

These exceptions *litis finitæ* quæ impediunt *litis ingressum* are according to Maranta of four kinds.—Jurif.

dant to slide away from the action and repelled the Plaintiff at the very threshold, since they were in truth reasons why the Defendant was not obliged to answer the Plaintiff's charge at all; and why the rest called simply *peremptories*, whether answering to Demurrers for substance or pleas in bar (for the Civil Law made no distinction whether the objection appeared intrinsically on the Plaintiff's own shewing or was suggested first by Defendant, but called it indifferently a peremptory exception) might be put in at any time before contestation of suit (21).

jurandi—rei Judicatæ,—transactionis and Præscriptionis. They sometimes however were not considered as declinatory or perempting the Plaintiff's entrance upon his action, and might be opposed after contestation; and sometimes the Judge was not satisfied about them, and so the cause went on and they were reserved to the hearing. "*Istæ exceptiones peremptoriæ aliquando requirunt altior rem indaginem. quo casu Judex debet eas reservare, et procedere ad ulteriora.*" See for all this, Maranta, pars 6. de exceptione, n. 12, 13, 14.

(21) They might however be proved after, and in actions *bonæ fidei* where forms were little attended to, might be put in after contestation of suit. Some peremptory exceptions were so far privileged that they could be put in even after sentence. Such were those of the *senatus consultum Macedonianum & Velleianum*, which may be translated pleas of Minority and Coverture, as to suretyships or securities.

If

If they answered to pleas in bar, it doth not seem so plain what is meant by saying that such peremptory exceptions were to be put in before contestation of suit, or how they could admit of it, since he who pleaded a special plea was not called upon to plead the general issue, or perhaps could not do it without contradiction: by contestation of suit then, in this case must be meant an affirmative contest, which would consolidate with the exception, (as E. G. true it is that I assumed, but you have since discharged me) (22), or perhaps it is meant that the Defendant might plead double the general issue and a special plea, where they were not inconsistent. To say that it means that the exception must be put in before itself was contested, would be an unnecessary truism.

Several exceptions might be put in one after the other, unless it appeared evident that the Defendant was designedly endeavouring to delay Justice, and to overpower his adversary with delay and expence, a liberty which has been

(22) And thus Heineccius in Pandeclas, part 2. sec. 32. seems to explain it. He says *Reus vel narrationem facti veram esse concedit, petitionem tamen actoris exceptione peremptoria elidit, vel facto et petitioni pure contradicit; priore casu litis contestationem affirmativam, posteriore negativam esse dicunt.*

O 2

perhaps

If

perhaps wisely taken away in some of the modern Continental Courts (23).

Besides the distinction of exceptions into dilatory and peremptory, they were also divided into Civil and Prætorian, E. G. the exception *de pacto* that the Creditor had agreed not to sue was not a legal plea, for it was *nudum pactum*, and the Debtor remained bound; it was admitted therefore only by Prætorian Equity, See Inst. 4. 13. 3. Another distinction was into *nominate* and *innominate*, the latter arising *ex facto incidenti* and called exceptions *in factum*. Another distinction was taken from the individual objects of each exception.

The Defendant having pleaded, the Plaintiff replied, and Defendant might rejoin under the name of *Duplicatio*, and so they might carry on the pleadings to a surrejoinder and rebutter

(23) In the Imperial Chamber, all exceptions within the party's knowledge must be put in at one and the same time, Corvinus, lib. 2. ch. 30. Query whether such a regulation would not be useful in our own Courts, where a succession of Demurrers for want of form surely often occasions a mockery of justice, nor doth there seem to be much reason why the client should be made to pay more than once for the instructions given by experience to a young Barister in good pleading.

under

under the name of Triplicatio and Quadruplicatio (24), but in well regulated tribunals the parties were seldom suffered to go beyond the Duplicatio.

When in this course of pleading, they came to a point which was affirmed on one side, and denied on the other, they were then at issue, as with us, and this contradiction was also (tho' as I have said (25) I think not according to the strict and original usage) called a contestation of suit; so that in a looser sense the suit was contested whenever they came to some point of fact, that was then ready for trial, or as Heineccius says *ubi Judex datus est*, when the Prætor was ready to send the cause to the Jury.

After contestation of suit, no change or alteration could be admitted in the libel. The Proctor became Dominus litis and could make a substitute and could not be revoked without cause—this was the regular time for administering the oath of calumny, for he cannot be said

(24) These Latin names were actually given to our pleadings in the early times of the English Law, see Inst. 4. 14. Bracton, lib. 5. Tr. 5. ch. 1. Black. Comm. ch. 20. p. 310. *Quotcunque vero allegationes concedent leges and Judices, semper reo ultima allegatio competit.* Hein. pars 6. 361.

(25) See Heineccius or the 5th book of the Pandects, part 2. sec. 31.

*

calumniari

columniari, qui Judicium nondum suscepit (26), and lastly, as has been said, it was too late to put in any dilatory exceptions, and many of those peremptory were also by it excluded from being subsequently proposed.

The suit being fully contested, matters were no longer transacted in *Jure* but in *Judicio*, the cause went from the Prætor to the Judices, or in other words it was ready for trial (27); the
Judices

(26) See Gail, lib. 1. Obf. 34. See also the Code 2. 53. De Juramento propter calumniam dando. In some respects the *Judicium* was said to begin from the citation; particularly in one which possibly might have thrown some light from analogy on a question much agitated not long since in the Irish Court of Exchequer, in *Swan v. O'Donnell*, where, upon appeal it was first determined that the subpœna was not the commencement of a suit so as to prevent statutes of limitation from running, and afterwards by the House of Lords that it was.

By the Civil Law, the mere citation was sufficient to interrupt prescription and limitation. See Gail, as above, and the Commentators quoted by him on the Code upon these subjects.

(27) Heineccius's account of the matter in his *Antiquities*, shews clearly how much they were a Jury, "*Prætor*, said he, *de Jure cognoscebat, decernens, quid* "*Jure sit pronuncianum si actor intentionem suam* "*probasset: Judex deinde de facto dispiciebat, utrum*
"actor

Judices then were sworn (28), and if the party disapproved of any of them, such persons might be challenged and set by, even as I conceive without shewing cause (29).

EVIDENCE.

All things being ready the party went into proof: proof was distinguished into *full* and *partial* or *sempiene*. Full proof consisted in confessions, testimony of witnesses, public written instruments and deeds, oaths, and presumptions. The *probatio semi-plena* was made by one witness,
by

“actor actionem suam an reus exceptionem possit demonstrare:” Si Juris tantum esset quaestio Praetor solus *extra ordinem* cognoscebat. Is not this a description of the different provinces of a Judge and Jury. See Heinec. Antiq. lib. 4. tit. 7. and Gerard Noodt. l. 8.

(28) *Sic scituri* says Justinian *quod non magis alios Judicant quam ipsi Judicantur*, Code 3. 1. 14.

(29) As the Jury however seem to have been struck at an earlier period, so the challenges or recusations seem to have been before contestation of suit, like the striking of a special Jury, for the Code says Lib. 3. tit. 2. 16. *Apertissimi Juris est, licere litigatoribus Judices delegatos, antequam lis inchoetur, recusare, unless lis inchoetur* may here mean going to trial, or examination of witnesses.

This *recusatio Judices*, which in my opinion meant nothing more than the challenging of a Juryman, has
been

by private books of account, by common fame, and by comparison of hand-writing. Mascardus subjoins to these two species of proof, signs and conjectures (30). The conjunction of two half proofs, of course produced a *plena probatio*.

been spoken of by authors in general, as if it was a power of refusing or declining the jurisdiction of the Court itself, on account of objections to the person of the Judge of the Bench, and such is the consequence of ambiguity of words, and of the false translation of the term *Judex*, that in the early periods of our own Law, Bracton and Fleta say that a Judge may be refused for a good cause, though now, says Sir W. Blackstone, the Law is otherwise, and it is held that Judges and Justices cannot be challenged, and the same holds I conceive of Judges Ecclesiastical, Comm. book 3. ch. 23. And the Civil Law is not speaking of *Judices Ordinarii*.

(30) See for the whole of the above divisions, Mascardus de probationibus, lib. 1. Wood's Civil Law, p. 310, &c. I have not inserted *notoriety*, which is rather considered as superseding the necessity of all proof, because its limits are too vague to afford any rules for saying where a Judge shall pronounce a thing to be notorious; some cases are plain, E. G. it would be absurd to ask for proof, that there was a civil war in England, in the reign of Charles I. * Mascardus also gives a chapter on the *Evidentia facti* as if a thing happened in sight of the Court; but this is not properly *probatio*, it supercedes its necessity, and is like our trial by inspection.

* Quæ vel nemo negat, populo vel teste probantur,

Vel se subjiiciunt oculis, notoria dicas.

LYNDWOOD.

The essential rules of evidence will be the same among all nations governed by reason, as that no man shall be a witness in his own cause (31),—that in every issue the affirmative is to be proved (32),—that hearsay is no evidence (33), while the technical rules E. G. such as respect the number of witnesses or the mode of their examination, may infinitely vary.

Confessions. This word confession, tho' sometimes applied to voluntary acknowledgments in a civil case, is generally used by the Civil Law as it is by us, with reference to crimes. The confession must have been voluntary, neither extorted by fear, nor induced by hope or promise of pardon, nor could it affect any but the party himself, and to make full and conclusive evidence it must be made in a court of justice.

(31) *Omnibus in re propria dicendi testimonii facultatem Jura submoverunt*, Code 4. 20. 10. *Nullus idoneus testis in re sua intelligitur*. Dig. 30. 10. 10.

(32) *Ei incumbit probatio qui dicit non qui negat*, Dig. 22. 3. 2. *Non possessori incumbit necessitas probandi possessiones ad se pertinere*, Code lib. 4. de probationibus, as with us in ejectments.

(33) *Testes rationem scientiæ reddere tenentur: non admittuntur ex fama dicentes testimonium*. See Heinec. in Pandectas, Vol. I. part 4. sec. 143.

tice (34), for otherwise it was only extrajudicial discourse, which amounted but to half

(34) ANSWER OF DEFENDANT.

It may appear odd that I do not here, under this head, annex some account of the personal answer of the Defendant in the Civil Law, from which answers in Equity are supposed to be derived, but in truth I can find no clear account of any such mode of proceeding in the Civil Law, and almost begin to suspect that it did not exist but in the designing imaginations of the Canonists. The authors who speak of it as the mode of the Civil Law such as Wood and Ayliffe, refer to authorities which do not support them, which indeed they frequently do in other cases.

They generally refer to interrogatory actions, or to the eleventh book of the Pandects, tit. 1. de Interrogationibus. But interrogatory actions were confined to a few cases, and particularly introduced to discover to what share of the *As* or inheritance the Defendant was entitled, because if the Plaintiff came upon him for more than his share, he was nonsuited; it being a principle of that Law, in actions *stricti Juris*, like the rule in our action of debt, that if he went for more than was due he failed in his action; it was therefore a bill of discovery, to lay the foundation of a future action, and when the same Pandect says "hodie autem Interrogatoriis actionibus non utimur. Nemo enim de jure suo ante Judicium respondere cogitur," though it may be implied, that he was forced to answer in *Judicio*, yet it may

half proof, provisions very similar to our own ;
 but to a solemn confession at the point of death,
 more

may fairly be inferred that it was only as to such matters, and they were a few enumerated, which had formerly been the subjects of interrogatory actions. Heinneccius properly observes in his comment on this book of the Pandects, that these had no similitude to personal answers. "Huc non pertinent positiones, quæ hodie ab actore respectu actionis offerri solent, eum in finem, ut præstito Jurejurando, adversarius ad singulas categorice respondeat, illæ enim interrogationes ad *instruendam* actionem, hæ probationis suscipiendæ causa inventæ."

Wood in speaking of the oath of truth says it is, when the Plaintiff or Defendant is sworn upon the libel or allegation, to make a true answer of his knowledge as to his own fact, and of his belief to the fact of others. One would imagine as to the Defendant, that this was a description of an answer in Equity, but it is not: the oath of truth was an oath taken by a party as to the value of a thing, to which no other proof could be brought, but it was not decisive like that to which the other party referred, and agreed to be bound by it.

What is said of the necessary oath in the 12th book of the Pandects seem to connect much nearer with the point, but that is said by Ayliffe and Wood to mean only what is well known by the name of the *suppletory* oath, or rather it had the meaning explained in the next page, and certainly was unlike our personal answers.

The Code saith de testibus, lib. 4. 20. 7. "Nimis grave est quod petitis urgeri partem diversam ad exhibitionem

more attention was paid, and it might by the aid of circumstances amount to a full proof like a judicial confession.

It

“ bitionem eorum, per quos sibi negotium præbet. unde
 “ intelligitis quod intentiones vestrae propriae debetis offere
 “ probationes, non adversus se ab adversarii adduci,” however though this seems to indicate a general principle, yet as it refers particularly to the production of witnesses, I cannot argue from it.

Without saying that personal answers were unknown to the Romans, (and it is observable that Judge Blackstone only says they were borrowed from the Ecclesiastical Courts,) I shall only add, that I have not found any specific head upon them, and therefore have not introduced them into the text. The treatises on the practice of Equity Courts, which compare our answers to the Roman, evidently confound the plea of the general issue with a personal answer, as in common parlance whatever the Defendant says may be called an answer to the Plaintiff. There is no title *de responsis* in the corpus, C. L. and one only *de interrogationibus*, and that is inapplicable.

Personal answers I imagine were not known till *possessiones* were introduced, and that was by the Canonists, and not till the time of Gregory the Ninth; so say the Commentators, when commenting on that passage of the Clementine Constitutions, mentioned below. There was it is true a necessary oath, which might be imposed on the Defendant, if he denied the debt, for in the Pandects, lib. 12, sec. 34, it is said, *Ait Prator eum a quo iusjurandum petitur, solvere, aut Jurare eogam*, but this was a

general

It is curious to observe how in speaking of confessions the Civil Law takes the same precautions with our Courts of Equity, that the admission of one fact shall not take away the ne-

general oath of denial, not a *special* answer to positions or interrogatories, and besides this oath was only administered by the Prætor where the Plaintiff not having proof offered to rest on the Defendant's oath, and might be avoided by the Defendant's saying to the Plaintiff, You know more of the circumstances.—I will leave it to your oath.

It is true, the Judge, as appears from 11 Dig. 1. 21. might interrogate. *Ubicunque Judicem Æquites moverit, æque oportere fieri interrogationem dubium non est*, but this was not the questioning by the party, and perhaps was confined to such matters as had been the subjects of interrogatory actions.

There seem to be the most direct authorities for my opinion in the Clementine constitutions, "lib. 5. De "verborum significatione, tit. 11. cap. 2. where it is "said, Positiones ad faciliorem expeditionem litium, "propter partium confessiones, & articulos ad clarior "rem probationem *usus longævus* in causis admisit." And in Heineccius in Pandectas pars 2. 42. "*Postquam* "enim litis contestatio *explicita & specialis* ad singula capita "libelli in foro passim penetravit," which quotation though it may seem to contradict my notion of the litis contestatio, proves his opinion that special answers were of a later date.

cessity

cessity of proving a *distinct* fact insisted upon by the way of avoidance, as where one confesses that he killed Titius in his own defence, the admission of the killing doth not take away the necessity of proving that it was in self-defence. But if it be *one* fact, as if on a charge of receiving 100l. it is answered, yes I did which you owed me; the whole confession must be taken together. See Wood's Civil Law, 311.

Witnesses. Much time is spent by the Civilians and Canonists in comparing the authority of written and oral testimony, i. e. of records or deeds and depositions taken down from oral testimony.

One famous Canonist (35) is such an enemy to parchment, that he ridiculously laughs at the credit paid to the hide of a dead animal, while others considering the fallibility of witnesses and uncertainty of memory, prefer written evidence, and Mascardus with much labour endeavours by a distinction to reconcile the parties. See Mascardus de probationibus. Vol. I. Quæstio 6₂.

(35) The Abbas Parnormitanus, a very celebrated Author in former times, and who is not unnoticed in some of our old Reporters, for instance, by Sir John Davies, in the case of the Dean and Chapter of Ferns.

The

The first requisite upon producing witnesses was to have them sworn, and this is particularly required by the Code, lib. 4. tit. 20. 9. *Jurisjurandi religione testes cogi, priusquam perhibeant testimonium Jamdudum præcepimus.*

No man could refuse to give his testimony after being properly cited whether in a civil or criminal case, but the person at whose request they were summoned was obliged to allow them the reasonable expences of their journey if they came from distant parts, and in extraordinary cases of illness or old age they might be examined at their own places of residence (36).

But though in general no man could refuse to give testimony, save in certain excepted cases of relationship, yet many orders of men were of course excluded from giving testimony in any

(36) *Constitutio Jubeat non solum in criminalibus Judiciis, sed etiam in pecuniariis unumquemque cogi testimonium perhibere de his quæ novit cum sacramenti præstatione, vel Jurare se nihil compertum habere. Code 4. tit. 20. de testibus, L. 16.*

Testes non temere evocandi sunt per longum iter, & multo minus milites evocandi a signis vel muneribus, perhibendi testimonii causa. Dig. lib. 22. tit. 5.

Omnibus autem testibus sine damno & impendio suo & Code 4. 20. 16.

cause

cause whatsoever. “Quidam propter reverentiam
 “personarum, quidam propter lubricum con-
 “filii, alii vero propter notam & infamiam
 “vitæ suæ non admittendi sunt ad testimonii
 “fidem” say the Pandects, 22. 5. 3. 5. to
 which must be added the ground of interest,
 while others were excused for multifarious rea-
 sons from attending in Court at least.

The *reverentia personarum* seems to have ex-
 cused some persons of the highest orders from
 being summoned into a Court of Justice, for
 instance Bishops (37), and this phrase also some-
 times respects the persons concerned in the trial,
 thus the freedman could not be a witness against

(37) Nec honore nec legibus Episcopus ad testimonium
 dicendum flagitetur. item dicit Theodosius, Episcopum
 ad testimonium dicendum admitti non decet, nam & per-
 sona oneratur, & dignitas Sacerdotis exempta confundi-
 tur. Sed Judex mittat ad eos quosdam de suis ministris,
 ut *propositis* sacrosanctis Evangeliiis, secundum quod decet
 Sacerdotis, dicant ea quæ noverint, non autem Jurent,
 Code lib. 1. tit. 3, 17.

So by the Canon Law, the Gospels were set before
 the Bishop *proposita* but he need not kiss the book.

Yet in general magistrates might be forced to give tes-
 timony, and even the Prætor in a cause of adultery,
 which shews the peculiar indignation at that offence.

his

his former master or that master's wife from the respect due by him to their persons.

Under this head may perhaps with propriety be placed the excusation of persons on account of relationship, which was carried to a very extraordinary and absurd degree as may be seen in the note (38) and in one instance as to parent and child amounted to absolute exclusion, and the right of the Client to prevent his Advocate or Proctor from revealing the secrets officially entrusted to him may be classed under the same head.

The *lubricum consilii* or want of discretion excluded Infants and those under age of puberty, unless they were *pubertati proximi*, and in criminal cases no person under twenty years of age was admitted to give testimony. I need not say that idiocy or insanity was even a stronger objection. Some have doubted, though without cause, whether women could be witnesses in any Court (39)

on

(38) "Nec cogendum aliquem testimonium dicere adversus focerum, generum, vitricum, privignum, so-
brinum, sobrinam, sobrino natum, eosve qui priore
gradu sunt." See Heineccius in Pandectas, Vol. I.
P. 453.

"Parentes & liberi invicem adversus se nec volentes
ad testimonium admittendi sunt," Code 4. 20. 6.

(39) With respect to wills, says Dr. Taylor, their
VOL. II. Q testimony

on account of the weakness of the sex; it is impossible that the wisdom of Rome should have put such an absurd affront on their understandings.

The *nota* related to persons *in vinculis*, the *infamia vitæ* to all persons rendered infamous by their crimes and punishments, to women of abandoned character, to infidels, apostates and heretics; and even the slave and the beggar, though not branded with infamy, were from the vileness of their condition incompetent while any other evidence could be had (40).

The objection of interest excluded not only near relations, but even intimate friends or mortal enemies (41), or any person who had before given testimony against the party (42);
a fortiori

testimony was not admitted, because the sex was excluded from those solemnities with which wills were made—but where their testimony was a matter of evidence there seems no good reason for rejecting it. See Ellis's Summary, p. 120.

(40) We cannot read without horror such passages as the following: “*si ea rei conditio sit, ubi harenarium*” “*testem personam admittere cogimur, sine tormentis*” “*testimonio ejus credendum non est.*” Pandects, lib. 22. 5. 21. and again, *tormentis subjiciendi si plebei sint*, Code, lib. 4. 20. 15.

(41) See Code de testibus, lib. 17. Wood quotes to this, D. 22. 5. 3. but there is no such authority there.

(42) This extravagant position is found in the Pandects,
deduct,

a fortiori the common objections of interest rendered a witness incompetent.

Persons excused from attending in Court, and who had the privilege of being examined at home, or where they resided at the time, were very old men, Soldiers on Service, public Ministers or Magistrates abroad on the service of their country, and other persons whose attendance was rendered impracticable by foreign imprisonment, or other situation.

Having thus enumerated the persons excluded or excused from giving testimony, I proceed to estimate the weight to be given to the evidence of those, who were legally admitted; this depended of course on their number, their integrity, their skill, the consistency of the circumstances, and the contrariety of evidence.

The number of witnesses was to be moderated and regulated by the good sense and prudence of the Judge, but it was the well known rule of the Civil Law, that at least two were required (43).

The

defts, lib. 22. 5. 23. "Produci testis is non potest, qui ante in eum *reum* testimonium dixit." Heineccius reasonably thinks that the reading should be in eam *rem*, to the same matter.

(43) "Judices moderentur & eum solum numerum testimonium quem necessarium esse putaverint evocari patian-

The considerations respecting the integrity of the witnesses, the regard to be had to the consistency of circumstances or *negotii qualitas* and the rules for ballancing opposite testimonies are dilated upon in the twenty-second book of the Pandects, for which I must refer the reader to the note below (44).

After

“tur, ne effrænata potestate ad vexandos homines, fu-
 “perflua multitudo testium protrahatur. Pandects, lib.
 “22. tit. 5. 1. Ubi numerus testium non adicitur, etiam
 “duo sufficiunt, plurium enim elocutio, duorum numero
 “contenta est.” *ibid.* 12.

“Sanximus, ut unius testimonium nemo Judicum in
 “quacunque causa facile patiaturs admitti, et nunc mani-
 “feste sancimus, ut *unius* omnino testis responsio non au-
 “diatur etiamsi præclaræ curiæ honore præfulgeat.”
 Code 4. 20. 8.

(44) “In testimoniis dignitas, fides, mores, gravitas ex-
 “aminanda est, D. 22. 5. 2. Testium fides diligentur
 “examinanda ideoque in persona eorum exploranda erunt
 “in primis conditio cujusque, utrum quis decurio, an ple-
 “beius sit et an honestæ inculpatæ vitæ, an vero notatus
 “quis et reprehensibilis, an locuples vel egens, ut lucri
 “causa quid facile admittat vel an inimicus ei pro quo
 “testimonium,” D. 5. 3.

“Si testes omnes ejusdem honestatis et exestimationis
 “sint, et *negotii qualitas* et Judicis motus cum his con-
 “currit, sequenda sunt omnia testimonia; si vero ex his
 “quidam

After the qualifications of witnesses, and the weight of their testimony our next consideration is the manner in which they were examined. Common opinion has always made this to be in secret, by depositions taken down in writing by an examiner like the mode in our Ecclesiastical and Equity Courts, yet there is the strongest reason to suppose that this was not the principle or practice of the Civil Law until the latest periods of Rome, and the distorting comments of the Canonists shew how much they were puzzled to torture expressions the most simple to their oppressive purposes (45).

The

“quidam eorum aliud dixerint, in impari numero, credendum est id quod naturæ negotii convenit, et quod inimicitæ aut gratiæ suspicione caret, confirmabitque Judex motum animi sui ex argumentis et testimoniis et quæ rei aptiora et vero proximiora esse comperuit; non enim ad multitudinem respicere oportet, sed ad sinceram testimoniorum fidem, & testimonia quibus potius lux veritatis adsistit.” *Pandects* 22. 5. 21.

“Qui falso vel varie testimonia dixerunt vel utrique parti prodiderunt, a Judicibus competenter puniuntur,” *ibid.* 5. 16. “Qui falsa in testimoniis protulerit, primum quidem de perjurio, deinde de falsi crimine convenitur.” *Code* 4. 20. 13.

(45) That in the time of Quintilian, witnesses were examined

The witnesses might be produced and examined three times, but their production a fourth time examined viva voce in open Court must be apparent to every reader. All that he says about their cross examination would be nonsense upon any other supposition. I should suppose from the words of Adrian in the Pandects, lib. 22. tit. 5. 3. that the same was the practice in his time, where he says "testimoniis apud me locus non est — testibus non testimoniis esse credendum — ipsos testes interrogare soleo." But this commentators interpret to mean only that the depositions were not to be taken at a distance, but the witnesses brought up to the Judge, to be by him still secretly examined. In like manner they construe the words of the Novell. 90. chapter the last which says "testium productio non nisi præsente fiat ad-versario" to mean only that the parties must be present at the *production* of the witnesses, not at their *examination*. But Heineccius seems to me to be of opinion that these are all forced constructions, when he says, Hodie tamen partes quidem præsentes sunt testibus Jurantibus, sed ubi examen instituitur secedere Jubentur. Qui error Pragmaticorum partim ex male intellecto textu, lib. 14. Code, tit. partim en prava versione Novell. 80. Cap. ult, ubi verba *Kai ἀκούσαι τῶν μαρτυρῶν* vertunt ut videant Jurare testes, partim ex Canonico Jure natus videtur. See Hein. on 22. lib. Pand. tit. 5. sec. 132. and again in his Antiq. lib. 4. tit. 17. sec. 16. audiebantur testes non remotis partibus ceu hodie fieri solet ex mala intellecta Zenonis constitutione, lib. 14. Codicis de testibus. Where

Secretarium

time was not allowed unless upon very peculiar circumstances and occasions, for after three examinations publication followed (46).

Public written instruments. Such were the public acts perfected by Magistrates,---the Censors tables,---the public accounts,---the archives of the state, instruments attested by Public Notaries.—In short, whatever rested upon public faith and authority, and such documents were deemed superior to any living witness (47).

Oaths. Oaths were *voluntary, necessary, and judicial*—the first require no explanation, the second were imposed by the Judge upon one party at the request of the other, the latter

secretarium meaning a Court was mistaken for a secret place, and again in the same place Heineccius says “*Romani producentem testes semper adesse patiebantur ut eos interrogaret, qua in interrogatione præcipue elucebat oratorum solertia.* But how will Heineccius get over such expressions as these, “*si testes producens editionem nondum acceperit, neque testationes perlegerit, Novell. 90. cap. 4.*

(46) See Novell. 90. whose title is “*ut Cognitis testimoniis, quartæ productioni testium locus non fit*” from hence our three probatory terms—possibly our three allegations.

(47) *Census & monumenta publica, potiora testibus esse Senatus censuit. Pandects 22. 3. 10.*

agreeing

agreeing to be determined by it, i. e. the Plaintiff or Defendant said I will give up the point if my opponent will swear to his cause of action; but this, as I have observed, is evidently and totally unlike a special personal answer. Judicial oaths were imposed by the Judge of his own mere motion. The last comprehended the *suppletory* (48) administered to him who had made but half proof and the *purgatory* to him against whom presumptions and circumstances militated. The oath *ad litem* must be added, when there was no question about a cause of action, but only about the value of the thing fought, which if it had been lost through the fault of the Defendant was estimated at its real value by the *oath of truth*, if by his *fraud*, at more than its real value by the oath *adfectionis*.

(48) I must observe that Burn and others stile these differently calling the suppletory the *necessary* oath, and what I with Heineccius have called the *necessary* they stile the *voluntary* or *decisive* oath. Both of these were taken by the Plaintiff, and were subdivisions of the *Jurjurandum in litem*. See Heineccius in *Pandectas*, pars. 3. sec. 49. Yet this oath of truth has been strangely defined in modern times to mean quite a different thing, probably to justify the demand of personal answers. Thus Oughton defines it, "quod subeunt testes de vere respondendo de positionibus, tit. 110. in a note.

Presumption.---

Presumption.—We are somewhat startled at seeing *Presumption* ranged among full proofs, but this could be meant only of such forcible *Presumptions* as admitted no proof to the contrary: (49), such were called *Presumptiones Juris & de Jure*. Where it admitted of contrary proof, and was drawn from circumstances not *necessarily*, but only *usually* attending the fact, if it was induced by the law always presuming it, as for instance, that every man was innocent till the contrary was proved, it was called simply *presumptio Juris*; if it naturally originated in the mind of the Judge it was called *Præsumptio hominis*, for example, the Judge must presume that every father would have an affection for his child, and *vice versa* that the presumption was against a charge of parricide until proved.

(49) Such Sir W. Blackstone, who here has copied from the Civil Law, calls violent presumptions, Comm. Vol. III. ch. 23. p. 371. though he is corrected by Dr. Christian, who holds that proof may be admitted to repel all presumptions whatsoever. See his note *ibid*. See much illustration of our doctrine of presumptions Cowper's Reports, pages 102. 110. and Fonblanque vol. 1. p. 319.

In a late case in Ireland between the Vicar and Parishioners of St. Andrews, Dublin, this doctrine was fully gone into.

Half proof. Though a single witness made but an half proof, yet there were exceptions to this general rule, as if in cases of great difficulty no other evidence could possibly be had, or in unimportant causes, or where the witness was of very extraordinary rank or character (50): and on the other hand sometimes a private writing was no evidence at all, as for instance on behalf of the writer or party himself unless produced by his adversary, tho' now says Heineccius, in Germany a Merchant's books of accounts rightly and duly kept, authenticated and produced shall entitle him to have the suppletory oath administered to him (51): and in general where half proof has been made, the suppletory oath or oath of the party is to be superadded to make full proof (52).

The defendant, if he had cause during all these proceedings might have reconvened the plaintiff, i. e. filed his cross bill or libel against him, and then both suits would have gone on

pari

(50) Mascardus de probationibus, lib. 1. Quæst. 11.

(51) Heineccius in Pandectas, pars 4. sec. 134.

(52) The case of Williams v. Lady Bridget Osborne is universally known. See Strange 80. Burn's Ecclesiastical Law, Vol. III. p. 90. I have known within

my

pari passu: if he had no such ground, or had neglected it, his only remedies after sentence were *restitutionem in integrum petere* (53), *actorem calumnie postulare, judicem falsi aut repetundarum postulare, vel denique interponere appellationem*.

Appeals.—Reserving a more full consideration of Appeals for another place (54), I shall only take notice here, that Appeals lay in all cases criminal as well as civil (55),—that an Appeal interposed by one operated for all his fellow-accused ---that no appeal lay from an interlocutory, unless it had the force of a definitive sentence,

my own practice the suppletory oath demanded by a husband who could produce no other proof of the marriage but his wife's letters.

(53) I have defined the *in integrum restitutio* too narrowly in page 58. It is thus described in the fourth book of the Pandects, title the first—"Sub hoc titulo
"prætor hominibus vel lapsis, vel circumscriptis sub-
"venit, five metu, five calliditate, five ætate, five ab-
"sentia, five errore."

(54) See the Practice of the Canon Law.

(55) So says Heineccius—Wood says only in *some* criminal, but the words of the Code, 7. 62. 14. and 29. are general, except the cause was tried before certain great officers, as the Comes Orientis, or Prefectus Augustalis.

or induced a *damnum irreparabile* (56)---that appeals were to be carried not *per saltum*, but *gradatim* to the next superior (Judge (57)----that appeals might be interposed viva voce or in writing, and apostles or letters dismissory were to be demanded within 30 days---that nothing was to be attempted by the judge below pending the appeal,---he must transmit all documents and necessary papers---that the judge *ad quem* was liable to great penalties if he did not receive the appeal---and that the appeal must have been interposed within four days after sentence, and prosecuted and finished within a year, which was called *primum fatale*, but sometimes a second year called *secundum fatale* was allowed; this was called *terminus juris*: but generally a shorter time was appointed by the Judge for prosecuting the appeal, which was called *terminus hominis*.

From the supreme power of the Prince no Appeal lay, but he might be prayed to review his sentence. Sometimes the Judge below unwilling to take upon himself the weight of a critical

(56) Hence the same rule in the Admiralty which is peculiarly governed by the Civil Law; otherwise in the Courts Ecclesiastical.

(57) We shall see presently how and why the Canon Law departed from this rule.

cause

cause referred it to a superior tribunal, which was called *relatio*.

Proceedings in Criminal Cases. We have hitherto said nothing of Arrests, because as we have observed above, after the cruel method of dragging the debtor *obtorto collo* was relinquished in all civil cases, there was no process but summons and distress infinite (58), but in criminal we have in the Code 9th book, large titles, *de exhibendis & transmittendis reis--de custodia reorum, et de privatis carceribus inhibendis*, which shew the natural and necessary difference in such proceedings.

Public Judgments differed from *extraordinary*, as the latter were instituted for crimes not coming under any ordinary specific denomination, and therefore presented before the general assemblies

(58) Here by the Civil as well as by our Common Law the process ended in case of injuries without force. Blackstone's Comm. book 3. ch. 19. p. 281. Perhaps in *actions ex delicto* there might have been arrests, but I am uncertain; the following quotation bears that appearance.

The law *Patelia Papiria* decreed that no one, "*nisi qui noxam meruisset* donec pœnam lucret in compedibus aut in nervo teneretur." See Heinec. 2 Antiq. p. 151.

Noxa is any *maleficium* or *peccatum*.

of

of the people, by a mode resembling impeachments.

We have observed that criminal modes of trial were of three kinds; for *inquisition* (59) and *denunciation*, however, we must look chiefly to the Canon Law, the Civil Law, though acquainted with these modes of proceeding, saying little of them in detail; but on *accusations* it is more particular.

The right of accusing and the form of indictments are discussed in one title in the Code, and one in the Pandects (60). The persons forbidden to be prosecutors in their own names were

(59) As to Inquisitions consult Dig. 1. 18. 13. Among other inquisitions those into the conduct of Viceroy, Governors, and Magistrates leaving their offices, who were obliged to stay in the province fifty days after the resignation of office, are remarkable. C. 1. 49. 1. As to denunciations or official informations given in to Magistrates and Presidents of provinces. See C. 9. 2. 7.

(60) De accusationibus & inscriptionibus. Dig. 48. 2. Code 9. 2. Lord Kaims saith, that the oath of calumny not being sufficient to restrain false accusers, they were obliged to indorse their names on the bill of indictment, thence called *inscriptio*, and so became liable to a lex talionis.

women,

women, and minors, (except in treason, sacrilege, or murder of their relations), persons of infamous character, freedmen against their patrons, slaves except for the murder of their masters; the accused therefore might object to the capacity of the accuser, and if he had ground might prefer an antecategoria or cross indictment. The inscription or indictment required a particular and accurate description of the crime, the person, the place, and the time, and it was to be subscribed by the accuser, that he might be duly punished for a false accusation.

The prosecution began by *in Jus Vocatione*, as did a civil suit, but here the power of actually arresting the party continued to be the law at all times (61). The next step was asking

(61) Humanity will be pleased with the following prison regulations. Statim debet quæstio fieri, ut noxius puniatur, innocens absolvatur; reum non per ferreas manicas & hærentes ossibus mitti oportet, sed prolixiores catenas si criminis qualitas catenas postulaverit, ut cruciatio defuit. Nec vero sedis intimæ tenebras pati debet, sed usurpata luce vegetari, et ubi non geminaverit custodiam, in vestibulis carcerum & salubribus locis recipi: ac revertente iterum die, ad primum solis ortum illico ad publicum lumen educi, ne pænis carceris perimatur. 9. Code, tit. 4. *de custodia reorum*.

leave

leave from the Court to bring the charge, *nomen deferre*. The party appearing on the appointed day, the Accuser preferred his indictment subscribed with his own name.---The Court then appointed a day for the trial usually at the interval of thirty days. The Accused then changed his dress and sought for patrons, and if on the day appointed he did not appear, he was exiled. The trial sometimes lasted several days, one day being often given to the Accuser to produce his proofs, another to speak to evidence, and then the Accused had still an interval of several days to prepare for his defence. His defence being gone through, tables of wax were given to the Judges, who wrote on them *A*, i. e. *Absolvo*---*C*, i. e. *Condemno*, or, *N. L.* i. e. *Non Liqueat*---the Majority prevailed, and then the Prætor or his Substitute pronounced sentence.

The venerability of the Magistrates who thus pronounced sentence was guarded by their character, and by their oaths, though the latter in process of time, were sadly perverted (62).

The

(62) Originally they swore that they would judge cum veritate & legum observatione, Code 3. 1. 14. but latterly se facturos secundum id quod fuerit Justius & melius, the latter word left infinite latitude, *ibid.* in

Auth.

The comparison of the Prætor in the Roman Tribunal to the modern Chancellor is in many respects fair, but the latter name has risen to eminence only since the Exstinction of the Roman Empire ; Chancellor at Rome was the title of a very inferior officer (63).

I am sorry that it is impossible, from want of space to give here a detailed account of the ranks of Advocates, and regulations (64) respecting

Auth. The law in Nov. 124. that the litigants should give nothing to the Judges, means to the Judices or Jury, who however claimed (as our Juries do) a small payment for their trouble, called *sportula*, though they do not seem to have imitated our custom of giving it in charity.

(63) *Cancellarius* was a Door-keeper in the Emperor's palace. This word so humble in its origin, has by a singular fortune risen into the title of the first great office of state in the monarchies of Europe, says Gibbon, Vol. I. p. 351. in a note.

(64) Some of them however I cannot refrain from copying, which may be found in the sixth title of the fourth book of the Code. Ante omnia autem universi advocati ita præbeant patrocinia Jurgantibus, ut non ultra quam litium poscit utilitas, in licentiam conviciandi, & maledicendi temeritatem prorumpant, nam si quis adeo procax fuerit, ut non *ratione* sed *probris*, putet esse certandum, opinionis suæ imminutionem patietur.

VOL. II.

S

Nullum

ing them and Proctors in the Roman Courts. The Lawyer who would take the trouble to peruse the 2nd book of the Code from the sixth to the thirteenth titles inclusive, which are upon this subject would certainly derive much amusement therefrom ; his curiosity would be gratified with the various ranks and arrangements, his pride would be flattered with the honourable distinctions bestowed upon them, (65) and his judgment

Nullum cum litigatore contractum ineat advocatus. Nemo ex industria protrahat Jurgium. Quisquis vult esse causidicus, non idem in eodem negotio sit advocatus & Judex. si sub specie honorarii, quod advocato usque ad certum modum deberi potuisset, si qui advocatorum existimationi suæ immensa & illicita compendia prætulisse sub nomine honorariorum poscentes fuerint inventi, ab hoc professione penitus arceantur.

(65) The Bar was a sure path to preferment ; after a certain number of years of honourable service, the advocates rose of course to certain honours, if not profits, of no small estimation ; for they were dignified with the title of Counts, as appears from the following extract from the Eighth title of the second book of the Code in its first order or decree, which is very remarkable, and begins thus—" Suggestionem viri Illustris, Comitis rerum
 " privatarum & proconsulis Asiæ diximus admittendam
 " per quam nostræ serenitatis auribus intimavit, fori sui
 " advocatus

judgment would be pleased with the order and system of the society.

It

“advocatos petitione magnopere postulasse, ut, postquam
“advocationis deposuerint officium, unumquemque eo-
“rum, qui in præsentī sunt, vel postea matriculis eorum
“pro tempore fuerint inserti, clarissimi primi ordinis Co-
“mitis perfrui dignitate; quatenus et tempore quietis
“fructum præteritorum laborum consequantur, proque
“fide atque industria erga clientes suos comprobata, a
“privatæ conditionis hominum multitudine segregati,
“clarissimis merito connumerentur”.

Mr. Gibbon in his 17th Chapter thus describes the honors and profits of the bar at Rome, “after a regular
“course of education which lasted five years the students
“of this lucrative science dispersed themselves through
“the provinces in search of fortune and honours; nor
“nor could they want an inexhaustible supply of busi-
“ness in a great and corrupted Empire. The Court of
“the Prætorian Præfect of the East alone, could furnish
“employment for 150 Advocates. The first experi-
“ment was made of Judicial talents, by appointing them
“to act occasionally as *assessors* to the Magistrates; from
“thence they were often raised to preside in the tribunals
“before which they had pleaded. They obtained the
“Government of a Province, and by the aid of merit
“reputation and favour ascended, by successive steps, to
“the *illustrious* dignities of the state. In the practice
“of the bar these men had considered reason as the in-

It is strange that Lord Kaimes should say there was not among these Barristers any *Calumniator Publicus*, any office resembling that of our Attorney General, or of the Kings Advocate in Scotland. Of the Public Accuser, a term since adopted by the French, we find mention both in Cicero and Pliny, (66) and in later times we hear of the *Advocatus Fisci*, (67) who defended the causes

* instrument of dispute *, they interpreted the laws according to the dictates of private interest, the same pernicious habits might still adhere to their characters in the public administration of the state."—the passage is too long to allow further transcribing.

(66) Cic. pro Rosc.—Plin. Epist. 3. 17. See also Hein. Antiq. lib. 4. 18. 17.

(67) See Code 2. 9. 4. and 10. 11. 5. There was an Advocate or Proctor of the Exchequer, saith Wood, p. 305. who had a salary from the public. Their duty was to manage the causes of the Prince and the public, and to *prosecute crimes*.

* Mr. Gibbon here seems to think that the technical mode of thinking of the mere Lawyer is not more accommodated to the extended sphere of a Statesman's contemplations, than his technical phrases to the language of an Orator. No less men than Mr. Burke and Mr. Fox seem to have adopted this idea on Mr. Hastings's trial, too much justified at the moment by the part which the bar had taken on the question whether a Parliamentary Impeachment ceased by a dissolution; we must allow at least many illustrious exceptions, among the foremost in England, Lord Somers; in Ireland, the late Chief Baron Burgh.

of the Treasury. We find also in the Court of the East (68) a *Primates Advocatum*, such as in Ireland is stilled Prime Serjeant, and in Scotland Dean of the Faculty. See Code. 2. 8. 3.

I have been silent as to Impeachments before the People, or accusations in the Senate. They bear no relation to modern practice, and long before the times of Justinian they were no more. The following Constitution of the Emperor Leo put an end even to any affected share of the Senators in the Legislature, and is a melancholy lesson to all Senates. Its title is (69) “ *Ne amplius Senatus consulta fiant*, and it says Quem-
“ admodum et in aliis legibus, quæ ad commu-
“ nem rerum usum nihil conferunt, fecimus;
“ ut eas tanquam supervacaneas e legum cor-
“ pore subduceremus; ita hic quoque facientes

(68) The whole Empire was divided into thirty-five military commanderies. All these commanders were *Duces* or Dukes, some only of them were *Counts*, which was a superior title invented in the Court of Constantine. Among these the Count of the East, Comes Orientis seems to have been most conspicuous; hence a Count of the Empire sounds so highly in Germany, which affects to represent the Western Empire, as Russia doth to represent the Eastern.

(69) Imp. Leonis const. 78.

“ eam

"eam legem quæ Senatoribus ferendarum legum
 "potestatem facit, e legum quasi republica se-
 "cerni sancimus, Nam, ex quo Senatoriam ad-
 "ministrationem imperatoria majestas sibi vindi-
 "cavit, *inutilis* illa esse judicari debeat." Hea-
 ven grant that posterity may never hear such a
 sentence of inutility pronounced upon our great
 Councils of the Nation!

Chapter the Third.

PRACTICE OF THE CANON LAW.

THE Canon Law so entirely took for its model the Civil, in order, arrangement, rules, principles and practice, except where Papal ambition thought it necessary to superadd, or Clerical ingenuity found it useful to misinterpret, that I shall only cull out some few instances of variation, on topics by it better illustrated, applicable to our present purpose, and relative to modern practice. I did not proffer to lecture on the Canon Law, and shall therefore slightly sweep along its verge, (1) and from this humble
bark,

(1) I am the less anxious on this subject, as it has been so admirably abridged by Mr. Reeves in his fourth volume, chap. 1.

bark, notice some of the prominent features of this vast continent, from afar.

Judicia, judgments, trials, or actions (2) were by them divided as by the Civilians into Civil and Criminal : the former into *real* and *personal* also into *petitory* for the property—*possessory* if only about the possession ; again into *universal* as if an heir sued for the whole estate—*General* as if a partner sued for a particular portion of property, and *singular*, as if the suit was to be for a single specific thing, as a horse, or a piece of plate ; a fourth division was into *double* and *single* as the one or both parties might be considered as Complainants or Plaintiffs, and a fifth known also to the Civilians was into *ordinary* before the Judices and Magistrates and *extraordinary* before the Magistrates only, but with the Canonists all judgments were extraordinary, and so indeed they were in the later times of the Empire (3).

But

For the difference between *causa—controversia—lis & instantia*. See Doujat in Lancelotum, p. 3.

(2) *Judicium est legitima sive ordinata rei inter actorem & reum controversæ apud competentem judicem disceptatio, sive cognitio & decisio.*

(3) *Quia abolito Magistratum & Judicum discrimine, omnia Judicia extraordinaria esse dicuntur ; in*
other

But the divisions of *Judicia* most dwelt upon by the Canonists were into Civil and Ecclesiastical—Ordinary and delegated—Plenary and Summary.

The encroachments of the Canon Law in the first division are more curious than important in the present enlightened day. Laymen, it is true, were not in general to be convened before the Ecclesiastical tribunal; but Matrimonial causes, Usurious offences, Perjury and the like, were exceptions even as to Laymen: and by one most audacious sweeping provision the Canonists at one period attempted to make themselves Courts of Appeal in all cases, viz. where in their opinions justice could not, or had not been obtained from the Secular Tribunals, or had been by them delayed. With respect to Clerics, effectual care was taken that they should always be tried by Ecclesiastical Judges, and if they attempted to renounce this privilege, *deposition* was their punishment, nor could the question whether

other words, when Judices or Juries were abolished. The Canonists sometimes speak however of ordinary and extraordinary judgments, meaning by the former those before *ordinary*, by the latter before *delegated* Judges.

VOL. II.

T

they

they were Clerks or not, be determined but by the Ecclesiastical Judge ; however, if the controversy was between a Layman and a Clergyman, the general maxim *Actor sequitur forum rei* prevailed, and the Layman if he happened to be the Defendant drew the cause to the Secular Tribunal.

Ordinary and Delegated—An *ordinary* Judge is defined, one who acts in his own right, (vel superioris beneficio universalem Jurisdictionem exercere potest), as a Bishop, Archbishop, Legate; *Extraordinary* or delegated, he to whom a cause is committed, by another having authority so to do (4).

The ordinary Judge may hold his court in any part of his district, a Bishop, E. G. in any part of his diocese ; if the power of judicature

(4) The Delegate of the Pope, or of the Crown might subdelegate—but no other could. A Vicar General or Chancellor appointing a Surrogate is not subdelegating for he is an Ordinary Judge. I formerly thought that Assessors, and Commissions of Adjuncts, originated with the Canon Law, but have since found them in the Civil. Assessors are not unknown to us. Thus the Archbishop of Canterbury to deprive the Bishop of St. David's, took six Assessors ; Masters in Chancery are called by Fleta *Collaterales* and *Socii* of the Chancellor.

be del
the ab
deed
commi
terwar
selves
yet th
them
forcing
of cou
diction
The
death o
persons
made f
suppose
sentenc
claring
time if
challeng
challeng
es, if n
was, th
the dele
self (5)

(5) By

be delegated to several, without a provision for the absence of any, all must act to make the deed valid; some of them undertaking the commission, those who declined could not afterwards interfere. They were to confine themselves strictly to the limits of their commission, yet though that commission omitted to give them a power of punishing contempts or enforcing the attendance of witnesses, it followed of course, as necessarily inherent in their jurisdiction.

The delegation terminated, by revocation, by death of the delegators, or of all of the delegated persons, unless in the latter case provision was made for the rest proceeding; by inability as suppose from a pestilence; by execution of their sentence, for then they are *functi officio*; by declaring themselves incompetent; by lapse of time if it were limited; by being recused or challenged, the trial of which recusation or challenge was to be before their fellow Judges, if no objection was made to them—if there was, then before arbiters or triers, or if it were the delegate of a Bishop, before the Bishop himself (5).

Plenary

(5) By the Civil Law an Ordinary Judge could not

Plenary and Summary—*Plenary* proceedings were those in which the solemn and accurate Judicial order was observed, a formal libel, a regular contestation of suit, conclusion, &c. &c. *Summary*, in which all this was unnecessary, and the proceedings were *de plano*, *sine strepitu & figura Judiciali*, in which dilatories and exceptions were by all means to be discouraged, and even holidays did not interrupt the course of justice, (6) and thus in the first ages of the Church were Ecclesiastical causes generally conducted; and such at all times were causes of elections, those matrimonial, and many others.

Whatever the species of Jurisdiction, the method of bringing the party before the tribunal of Justice appears to have been by summons, and not by arrest; (7) and in some modern Tribunals one peremptory citation instead of

be recused.—A Delegate might, even without assigning cause, which further confirms the notion of the Roman Jury.

(6) See the Clementine constitutions, cap. ult. de verb. significat.

(7) *In jus vocatur reus, non veterum Romanorum more (quo, nisi fidejussorem daret, invitatus in jus traheretur) sed citatione.* Doujat, p. 25.

three

three citations known to the Romans, appears to be the practice: (8) but the party's appearance was excused if he was cited out of his province or the Judges jurisdiction, (9) or if the place was insecure through war or pestilence, or the time absurdly short; or if he was prevented by sickness, or his adversary, or cited before a higher Tribunal; and if the Judge had but delegated power, he must insert in the citation the tenor of his commission, and the site of his Tribunal, which was not incumbent upon the known ordinary jurisdictions.

The party on the way might stay the suit by getting his opponent to agree to a *pactum* or *transactio* (10) or to leave the matter to *arbitration*; and here it is to be observed that *ex nudo pacto competit actio* was a principle of the Canon Law (11).

(8) In Camera imperiali. Gail 1. Obf. 51. No. 10.

(9) As with us, if he be cited out of his diocese.

(10) Differt a *pacto transactio*, quod cum *pactum* de re certa & indubitata & plerumque gratis fiat, *Transactio* & de dubia ac lite incerta, nec nisi aliquo dato, vel contento, aut promisso. Doujat in Lancelm.

(11) Contrary to the Civil Law. See Vol. I. of this Work, p. 347.

If

If the party contumaciouſly abſented himſelf, his contumacy was variously puniſhed, ſometimes by a decree againſt him for the matter in conteſt, ſometimes by fine or ſequeſtration, or *miſſio in bona*. This laſt method in real actions put the Plaintiff into poſſeſſion of the thing in queſtion, which after a year was not revocable by any ſubmiſſion—in perſonal gave him the cuſtody of ſome property of Defendants, equivalent to his demand, which was reducible into poſſeſſion at the end of a year by a *ſecundum decretum*, (which in a real action was not neceſſary,) leaving the mere right only diſputable by the party; there was no *miſſio in bona* in ſuits about benefices, and latterly bail or ſcurities were always taken in lieu of it.

The party appearing might appoint a Proctor, (as might his adverſary,) who muſt have been above the age of 25 (12). Any perſon might be a Proctor, whether Clerk or Layman, (Biſhops and Priests excepted,) and any perſon above 14 might appoint a Proctor, but if under that age the Biſhop or his official muſt

(12) The canon law diſtinguiſhed between a Proctor *ad negotia*, and one *ad lites*, the former might be at 17. The Civil Law made no ſuch diſtinction,

appoint

appoint for him a Curator of suit (13). The Proctor or Proctors must not exceed their powers, and a general proxy could not enable them to do things, which plainly required a special authority; for instance to compromise, they must have a special proxy, and they could not substitute others until after contestation of suit, unless their original proxy specially gave them such powers, and such special liberty was necessary even to recall the substitutes already appointed. The Proctor might be recalled expressly or tacitly, or by the principal's undertaking the business himself, and even after contestation of suit by the death of his employer, if that employer were a Bishop, or a superior of a religious house.

The ancient accuracy of the Civil Law in editing the action or suit being done away, the (14) Canon only required in the libel a plain narration of the fact. The libel being put in, the

(13) This is the case with us; but in France, Curators of suit could only be appointed by the Temporal Courts.

(14) *Jure Pontificio usu confirmato hodie sufficit, factum ita narrari, ut ex ea aliqua actio commode elici possit.* Gail Obs. 61. N. 2. nec necesse est, ut olim, actionis nomen edi. Vid. Vulteiium in Corvinum, lib. 2. cap. 27. Several actions might be joined in the same libel.

*

other

other party, if he had foundation for it, might reconvene.

The analysis of the pleadings being nearly similar to that in the Civil, I hasten to proofs on which the Canon Law has some peculiar provisions (15). And here I must observe, that by the ancient Canon Law, after contestation of suit, the libel did not then, as it doth now, wear an articulate form, and was not divided into separate heads, charges, clauses or articles, like the present libel of the Spiritual Court, but proceeded in one continued narration like a bill in Chancery, and was all repeated over again under the name of positions, and articles,——*positions*, meaning those parts to which the adversary's answer was required; *articles*, those which the party intended to support and prove by witnesses (16): but in modern times to save this repetition, the libel itself was *ab origine* formed *articulatum*.

Proofs were made according to the Canon Law, by witnesses, instruments, oaths, inspection, notoriety, suspicion and fame. The witnesses were to be sworn, and if they refused to

(15) I have already given my reasons for thinking that personal answers were created by the Canon Law; ante, p. 45. in a note.

(16) See ante p. 18.

give testimony, were liable to excommunication. The witnesses were to be in number two at least to supply proof or to impeach testimony, but one was sufficient to impede an act, as for instance, the repetition of baptism, or the contracting of marriage. More than two were required to condemn a Bishop or a Clerk and in Canonical purgation, but the possible number in any case was limited by reason and by law, first to forty, afterwards to ten; for by the ancient Civil Law, 120 witnesses were sometimes suffered to be produced, an absurd number, more likely to *cloud* than to elucidate the truth. The witnesses were in strictness to be examined by the Judge himself, but on occasion he might delegate a Notary Public, or even a private person, to be the examiner (17).

(17) The Civil Law did not admit any person to be an examiner but the Judge himself, or at least some one possessed of jurisdiction.

The Canon Law supposes the Judge by examining the witness himself to give to the trial all the benefit of a cross-examination, for it says, "*illud quoque subtiliter animadvertere non omittet, quo vultu, qua constantia, quave animi trepidatione testes deponent, cum interdum ex his, vel ipsis invitis testibus, magis quam ex verborum serie veritas elucescat.*"

Slaves could not be witnesses, nor could women unless in cases of simony, that greatest of crimes in the eyes of the Canonists (18). The Secular Clerks were easily excused from giving testimony, and the Regular Clergy in Criminal cases were not allowed to be witnesses without licence from their superiors, and if they neglected a summons in Civil Causes, could only be mulcted in some slight fine or penalty (19).

(18) The reason given for excluding slaves doth not want plausibility; Status Servilis animum deprimit, & timori, adulationi, ac mendacio, facit obnoxium. Would to heaven that in all times of terror or of torture the existing tribunals would remember this description of evidence coming from minds depressed.

The objection to women was barbarous and absurd—the old adage was introduced, “*Varium & Mutabile semper fœmina*,” but above all a woman could not be a witness against a Clergyman.

The credit given to a Notary Public by the Canon Law, and in modern times by all the courts of the Continent, goes far beyond our ideas in England and Ireland. In a curious note of the late eminent Dr. Beaver, communicated to me most kindly by a highly respected Prelate, the Bishop of Kilmore, he mentions an instance in which a cause had been lost before Sir George Hay, because a Notary Public in France thought it an indignity to him to be examined upon oath.

(19) For instance, says Corvinus, by seizing their horse, if they have one.

Jews,

Jews,
admitted
Domesti
to an ab
allowed
he had
was war
stituted
probator
witnesses
of the p
delay, a
fore, and
positions
Publi
be prod
but they
ginal ca
No e
of a wit
that it
knowled

(20) N
fed novis
publicatio
the next

Jews, Pagans, Heretics, and Infidels were not admitted to give testimony against a Christian. Domestic relations were excluded, and so were relations to an absurdly remote degree, and no man was allowed to give testimony in a cause in which he had been Advocate or Proctor; if a Judge was wanted as a witness, another must be substituted in his place; three delays dilatory or probatory terms were given for the production of witnesses, but not a fourth without the oath of the party, that he did not craftily seek any delay, and did not know of these witnesses before, and that he was not acquainted with the depositions already given.

Publication having passed, no witnesses could be produced to the articles already exhibited, but they might to new matter both in the original cause and the cause of appeal (20).

No exception could be put in to the *person* of a witness after publication, unless it appeared that it had subsequently come to the party's knowledge, or he swore at least that he did

(20) Non super iisdem articulis, nec directo contrariis, sed novis ex veteribus pendentibus, modo non obstat publicatio testium—but this shall be further explained in the next chapter.

not oppose it with fraudulent or dilatory intent.

The Canon Law seems to have introduced the rule *in testem testes & in hos, sed non datur ultra*, that is, the witnesses brought to support an exception to credit and who impeach the original testimonies, may themselves have their credit impeached; but this contest shall go no further, *non licet examinare testes reprobatorios reprobatoriorum*. The Judge might repeat and interrogate the witness down to giving sentence at all times to satisfy himself, and the witness might correct his sayings if he did it immediately, but I do not find mention of that modern privilege of the witness of being repeated after a length of time (21).

Written instruments might be exhibited even after publication, provided it was before *conclusion* in the cause, but a distinction was taken between those public and authentic, and those private. Of the former kind were public acts, monuments, judicial records, instruments authenticated by a Notary Public; to these full

(21) A Layman could not be a witness against a Clergyman. Examining witnesses *in perpetuam rei memoriam* seems to have been introduced by the Canon Law; witnesses by the Canon Law might be reprobated after an appeal, not so by the Civil.

credit

credit w
no proc
with us
Record,
sition to
instrum
cepts,

Conclu
partibus,
when t
tory te
dence t

And
Gail an
Canon I
want of
ings, b
custom,
Clemen
does no
Howev

(22) C

(23) I

this part
ter, it is
Ch. 2d.
meaning
seeds and

credit was given, and if authenticated by a Judge no proof could be admitted to the contrary, as with us the party's only plea would be *Nul tiel Record*, but proofs might be admitted in opposition to the seal of a Notary Public. Private instruments were such as books of account, receipts, letters and the like.

Conclusion in the cause was said to be *cum a partibus, omnibus probationibus renuntiatum fuerit*, when the parties renounced all further probatory terms, declaring they had no more evidence to produce.

And this form called *conclusion*, Maranta and Gail and all writers agree not to be by the Canon Law *de substantia processus* (22) so as that the want of it should nullify or vitiate the proceedings, but rather to have been introduced by custom, and ratified by being recognised in the Clementine Constitutions ; (23) for the Civil Law does not seem to have known any such form. However in modern practice Gail says that the

(22) Gail, lib. 1. Obs. 107. Maranta, part 6. p. 358.

(23) I would recommend to the reader the perusal of this part of the Clementine Constitutions viz. One chapter, it is not long, of the book *de Verborum Significatione*. Ch. 2d. while it purports principally to explain the meaning of the term *summary* proceedings, gives the seeds and origin of all modern practice in a few words.

Imperial Chamber considers a legitimate *conclusion* as indispensably requisite, and so it seems to be considered in our Courts, in Plenary Causes.

Sentence was to be pronounced by the Judge himself, for none but a Bishop could appoint a substitute, and ridiculous to say the very posture of sitting was made essential to the validity of the sentence, *quia sessio quieto & meditantii convenit*. If Ordinary Judges were equally divided, sentence was given for the Defendant unless the Plaintiff's was the favourable side—if delegated, the delegator was to decide. The Judge must give sentence according to the laws, even the Pope himself, with an admirable exception as to his holiness, viz. *nisi aliquid causa necessitatis & utilitatis dispensative duxerit statuendum*.

Appeals. Appeals must be brought within ten days, otherwise the sentence passed *in rem judicatam*, unless in matrimonial causes, and a few others. By the Canon Law, the party might appeal *extrajudicially*, even from an apprehended grievance, or before the threatened suit was commenced, which was called *provocation*; and judicial appeals might be either from an interlocutory or definitive sentence (24). But in the former

(24) Whereas by the Civil, they could be only from definitive

former
than in
terlocut
(of who
might j
fory mu
thirty d
alledge
from a
was not
need no
appeals
instantia

The C
Civilians
next sup
by perm
Rome fr
nial pri
gular Pr

finite se
of a defi
one which
tence. T
Court of
(25) A
be proper

former case much more strictness was required than in the latter, for the appeal from the interlocutory must express the cause of appeal, (of whose sufficiency and truth the Court above might judge), and Apostles (25) or letters dimissory must be demanded and exhibited within thirty days, nor could the Appellant assign or alledge any new matter: whereas in Appeals from a definitive sentence, the same strictness was not attended to in point of time,---the cause need not be expressed,--and the party might as in appeals by the *Civil Law*, *Non allegata in prima instantia allegare, Et non probata probare.*

The Canon Law departed from the rule of the Civilians that appeals should be made to the next superior Judge, to increase the Papal Power by permitting appeals at once to the Court of Rome from all other Courts; and from congenial principles of Ecclesiastical polity forbade regular Priests to appeal from a definitive sentence.

definitive sentence, unless the interlocutory had the force of a definitive, or induced a *gravamen irreparabile*, i. e. one which could not be remedied by any definitive sentence. This rule of the Civil Law is followed as to our Court of Admiralty.

(25) Apostles *Αποστολοι* from *αποσειλλων* which may be properly translated *dimissories*.

All

All *innovations* between the giving of sentence, and the time of appealing might be revoked, but *attentates* after an appeal from a grievance before an inhibition served, (which was not done in such case till it appeared to the Judge above that the appeal was well founded,) were not to be done away; if there were several Judges, an appeal in the presence of a majority was sufficient, and if several joint parties, the successful appeal of one availed to all the rest, even though they did not adhere to the appeal. The Supreme Pontiff was used frequently to issue commissions to his delegates, with a clause of *Appellatione remota*, which precluded all appeals from sentences as merely inequitable to the party, but could not prevent those from decisions contrary to express laws and constitutions and to manifest reason; as for E. G. if the trial was appointed at a place to which notoriously the party could not go without extreme danger of his life. The terms for prosecuting appeals, and after which they would be declared deserted, were the same as in the Civil Law. Vid. ante p. 60.

Criminal proceedings. These were as before mentioned of three kinds.

Accusation.

Accu
preced
petent
Den
only a
ceding
of the
Inqu
own ac
Accu
ment--
life an
buses
known.
The
Canon
tor wh
from of
was not
Some
forward
rafter,
(25) L
accusator
Rei, ac J
qualitate,
(26) L

Accusation. When a solemn *inscription* (25) preceding, the charge is brought before a competent Judge.

Denunciation (26) was when no inscription but only a charitable or friendly administration preceding, the crime is brought to the knowledge of the Judge.

Inquisition. When the Judge inquired of his own accord, induced to do so by public fame.

Accusation was intended to produce punishment---Denunciation to effect amendment of life and correction of manners---the horrid abuses of Inquisition in modern times are well known.

The false Accuser was liable by the ancient Canon Law to the *lex talionis*---the Denunciator who failed in proof, at least to suspension from office and benefice until he proved that he was not actuated by malice.

Sometimes though no accuser or witness stood forward nor any confession impeached the character, yet fame operated so far as to call upon
its

(25) *Inscriptio*—*Articles or indictment*, est libellus ab accusatore subscriptus a se reum deferri profitetur, suo, Rei, ac Judicis nominibus expressis, additisque criminis qualitate, loco, & mense.

(26) Lancelot observes, or rather Doujat, that De-
lator

its object, for a defence, or at least to purge this disrepute. Purgation was two fold *vulgar* and *Canonical*. *Vulgar*, such as the trial by single combat, or ordeal by passing over a burning ploughshare. *Canonical* by *Compurgators*, a method approved by the sacred Canons and the proper child of this law, for no such notion or form was ever introduced in the Civil.

The *Compurgators* must have been men superior to all exception, and well acquainted with the person to be thus purged of crime. If they did not acquit him, he became liable to the sentence annexed or applicable to that crime as if he had been regularly convicted, unless the equitable discretion still left in the Judge relieved him from it.

The great general division of crimes by the Canon Law was according to the tables of the Decalogue into those against God, and those against man: The former, comprizing simony, heresy, schism, apostacy, witchcraft, sacrilege; the latter, homicide, adultery, theft, usury, perjury, fraud and the like.

lator or Denuntiator is not much distinguished by the Civil Law from the Accuser.

Chapter the Fourth.

ON THE PRACTICE OF THE ECCLESIASTICAL COURTS.

HAVING now taken a short survey of the practice of the Civil and Canon Laws, we shall be the better prepared and enabled to understand the practice of the Ecclesiastical Courts; in fact we have made a considerable progress in the knowledge thereof already. I shall speak first of the Consistorial, then of the Prerogative, and lastly of the Courts of Appeal.

All proceedings in the Court of Prerogative being summary, to understand practice thoroughly, our first and principal attention should be paid to the Consistorial Courts, for having once well comprehended the proceedings in a plenary suit, it will be easy to explain those in a summary.

X

OF

OF THE PRACTICE OF THE CONSISTORIAL COURTS.

CAUSES in these Courts are either plenary or summary. *Plenary* (1) being those in which the order and solemnity of the law are exactly observed, so that if there is the least infringement or omission of that order the whole proceedings are annulled.---*Summary* those in which such order is dispensed with. My first business shall be, and it is much the most important to explain the order of proceeding in plenary causes.

In every Plenary cause there are three parts, one from the citation to the contestation of suit inclusively.

The

(1) Plenary causes among many others are all testamentary causes, except in the Court of Prerogative, Jactitation, Dilapidation, Simony, and all Causes of Correction from the office voluntary promoted. Tithe causes in Ireland, and those from the mere office, may be examples of summary. Defamation causes may be heard *summarissimè*.

If in plenary causes, the proceeding be summary, (*i. e.* without contestation of suit) an Affignation and term to propound all things and to conclude, (and without conclusion,) the whole is a nullity; but if in summary causes

The
clusively
The
tence.

Under

1. C

2. C

3. A

4. T

5. E

Under

1. F

2. P

3. P

4. P

5. T

6. C

Under

1. Se

2. E

the proce
doubt, th
Oughton

(2) I t
one some
vil Law
ria Judic

The second, from the contestation of suit exclusively to conclusion in the cause inclusively,

The third from conclusion to definitive sentence.

Under the first division, I shall consider

1. Citation.
2. Contumacy.
3. Appointment of a Proctor.
4. The Libel.
5. Exceptions, Replicatⁿ. and Contestatⁿ. of suit.

Under the second,

1. Further Allegations.
2. Personal answers.
3. Proofs by witnesses.
4. Publication.
5. Term to propound.
6. Conclusion.

} With exceptions to
each.

Under the third,

1. Sentence.
2. Execution. (2)

CITATION.

the proceeding be plenary, it is not invalid. In case of doubt, therefore it is better to proceed plenaryly. See Oughton's Ordo Judiciorum, Tit. 7.

(2) I think this the plainest analysis; Oughton makes one somewhat different, and many of the writers on Civil Law a third still different from his, viz. *in preparatoria Judicii*, the preparatives of the cause, which are down

C I T A T I O N.

Since Citation is the beginning and foundation of the whole cause, and an invalid citation can produce no effect (unless cured by the appearance of the impugnant in person, or his lawful Proctor) it is necessary to attend to the requisites to a good citation, which Gail reduces to six (3), viz. the insertion of the name of the Judge---of the Promovent---of the Impugnant---of the cause of suit---of the place---and of the time of appearance, to which we may add the affixing the seal of the Court, and name of the Register or his Deputy.

In mentioning the Defendant besides the description of him evidently necessary, the 69th Canon in Ireland (4), ordains that no Bishop or other Ecclesiastical Judge, shall suffer any general process

to contestation of suit, and *Judicium ipsum* the cause itself which is from contestation of suit to sentence inclusively, and divide both the preparatories and the members of the cause itself into substantial and incident. *Intervention* and *Reconvention* will come in with more clearness, after once analysing a simple suit free from those ingredients.

(3) Oughton doth the same. I prefer Gail to Maranta upon this head, because the latter expressly declares, that he is looking to the local practice of the kingdom of Naples.

(4) The 120th in England.

of Quo
cept th
cited,
hand o
said pr
first fu
and hi
The
be co
by let
be enj
by the
dians,
with a
dic la
Court,
out of

Un
cited
must
not ap
with t

(5)
suit, n

of *Quorum nomina* to be sent out of his Court, except the names of all such as are thereby to be cited, shall be first expressly entered by the hand of the Register or his Deputy under the said process, and the said process and names be first subscribed by the Judge, or his Deputy, and his seal thereto affixed.

The species of person to be cited is also to be considered. Noblemen are to be cited by letter missive, Minors under twenty-one to be enjoined to appear according to law, that is by their Guardians (or if they have no Guardians, themselves or the persons they reside with are cited) and Bodies Politic by their Syndic lawfully constituted. From a Consistorial Court, no Citation can issue to summon a man out of his diocese. (5)

CONTUMACY.

Under the last head we supposed the party cited to pay obedience to the citation. We must now consider the case of his contumacy in not appearing. First, when he has been served with the citation ; secondly, where he absconds,

(5) By Statute, but if he appear, and submits to the suit, no prohibition will be granted.

or

or at least cannot be found, to be served with the citation; and, thirdly, I will consider the case of his appearing, and disappearing again.

In the first instance, the primary citation being returned, and oath made of the service thereof, and upon proclamation made the party not appearing, it is prayed in pain of his contempt that a citation issue summoning the party to shew cause why he should not be excommunicated.

This being served on him and not being obeyed, a citation issues to him or her to *see* or *hear* themselves excommunicated, together with a mandate or authority to some proper person to execute the said citation, the whole of which is usually prayed for by the name of a *Videndum ad mandate*. (6)

The last mentioned citation being returned, and oath made of the service thereof, and the mandate being also returned together with a certificate of the execution thereof, the Judge assigns the party to be excommunicated, which however still cannot be done till the end of fourteen days,

(6) If the party once appear and appoints a Proctor who exhibits a proxy, all the trouble on the opposite page is saved for this Proctor never can disappear in the Consistorial Court.

at

at the expiration of which time the Proctor offers a schedule or decree for excommunication in writing, which the Judge at his petition, on that or perhaps the next court day (7), reads and promulges (8). The party is then to be *denounced* and declared excommunicate in his parish church, by the Minister only, in time of divine service upon a Sunday, and the denunciation with a certificate of the execution thereof is lodged with the Register, and then if the party stands out excommunicate for forty days, to be reckoned not from the excommunication but from the denunciation, application is made to Chancery for the writ *de Excommunicato capiendo* (9).

After all this tedious process, though the contumacious person is punished, his adversary has

(7) Whether this and other acts shall be done on succeeding court days, or more time be given and allowed, must depend very much on circumstances, and the discretion of the Court.

(8) If the Judge be a Layman, he must call in some proper and discreet Clergyman to read the sentence of excommunication in his presence.

(9) The proceedings, if the party stands out excommunication for forty days, with application to Chancery for the Writ de Excomm. Cap. are spoken of in another place.

made

made little progress towards the hearing of his cause. He must now to enable himself to proceed to hearing without an appearance on the other side, issue a citation called a *citation to all effects*, the purport of which is to desire the defendant to come and see all the proceedings which are to be had, recounting them minutely up to final sentence. A libel is next lodged in the registry, and an order made that the opposite party do answer it, within a certain time, which he not doing, his non appearance is taken for a negative contest (10), or plea of the general issue, and the Plaintiff or Promovent proceeds with his proofs, and goes on to hearing.

2dly, Now suppose the party absconds, and cannot be served, or it cannot be found where he is though he doth not intentionally conceal himself, the Primary Citation being returned with a *Non est inventus*, in the former case a Citation *vult & modis* issues, in the latter a Public Edict.

(10) But in the Prerogative where the proceedings are *summary*, upon the return of the first Citation, the non appearance is taken for a negative contest and you pray liberty to file a libel, no *videndum ad mandate* nor any thing of that kind being necessary, except in proceedings for costs, and such like.

The
ports,
ways t
publica
time of
door o
Church
usual w
fixing
noted p
This
of the p
Court,
the Pro
tumacy.
Crier of
macy re
cause w
which b
Videndu
the party
denounc
tion to a
liberty is
(11) T
tered for t
VOL.

The citation *viis & modis*, as the name imports, must be executed in all or any of the ways that occur of making it most public---by publication in the Street, or in the Church in time of Divine Service, or by affixing it to the door of the Mansion-house (11) or Parish Church of the party, or perhaps, (which is the usual way of executing the Public edict), by affixing it on the public Exchange, or some such noted place of resort.

This being done, a certificate must be made of the premisses, and the citation brought into Court, and if the party cited then appear not, the Proctor of the opposite party accuses his contumacy, he being first three times called by the Crier of the Court, and in pain of his contumacy requests that he may be cited to shew cause why he should not be excommunicated, which being returned also with a *non est inventus*, a *Videndum ad Mandate viis & modis* issues, and the party is then excommunicated, and afterwards denounced excommunicate; after which a citation *to all effects* issues, upon the return of which liberty is given to the promovents' Proctor to ex-

(11) The outward door, for the house cannot be entered for the purpose without consent.

hibit a libel and produce and examine witnesses, and to go on to sentence.

3. The third case is where the party has appeared and appointed a Proctor who exhibits a proxy, and afterwards wants to disappear again. In the Prerogative Court this doth not signify, as he can be proceeded against in his absence; but in the Consistorial Court formerly infinite delay and mischief was occasioned by this trick of an impugnant, because his adversary was obliged in such case over and over again to proceed by Videndum ad Mandate, even to compel him to answer or join issue upon a libel or allegation. In the Consistorial Court therefore, the late eminent Judge established a rule which has been followed by his very learned successor, that either party when he appears and exhibits a proxy cannot disappear under pain of suspension of the Proctor attempting so to do, which salutary mode renders the old tedious process in such case unnecessary. There seems however to be a difficulty where a personal answer is called for, for that the Proctor cannot give in; but I have heard it said, that in such case for want of the answer, the party would be excommunicated *instante*. And in another case the party must be proceeded against personally and excommunicated, and the appearance of his Proctor can

be

be of
pended
in not
ing the

AP

The
usual c
posing
Proctor
may be
after.
then t
which
tor in t
at least
proceed
client,

The
party p
leal att
merely
have t
general

(12)
not occu

(13)

be of no service, or rather his appearance is suspended, viz. where the party is contumacious in not obeying the order of the Court respecting the payment of alimony (12).

APPOINTMENT OF A PROCTOR.

The citation being returned, a Proctor in the usual course appears for the Promovent, and supposing the Impugnant to obey the citation, a Proctor also appears for him. These Proctors may be recalled before contestation of suit, not after. After contestation of suit and not until then they become Domini Litis, the effect of which is, that they can substitute another Proctor in their place, which they cannot do before at least without a special proxy, and may then proceed in the suit, even after the death of the client, and all notices are directed to him only.

The Proctor is to be appointed verbally by the party present in Court (13), or by writing under seal attested by a Notary Public or sometimes merely signed by the party. And though he have such authentic proxy under seal for all general purposes, a special proxy may still be

(12) There may, perhaps, be other cases which do not occur to my recollection.

(13) Usually in writing.

requisite,

requisite, to give him authority for some particular purposes.---E. G. in a testamentary cause, suit having been contested, and the will denied, the party cannot afterwards come in and confess the will on his general authority without a special proxy for that purpose; if therefore he has no special proxy, he must let the cause go on upon proof, to a hearing *ex parte*.

Proxies are always necessary, but particularly in the Prerogative Court, because there they proceed in the absence of the party, which cannot be done in the Consistorial Courts.

The Proctor ceases to be Proctor and is *functus officio* after sentence and appeal, or by the death of the party before contestation of suit, or he may inform the Court at any time that he wishes to be no longer employed for the party.

In ancient times, besides the libel there were put in after contestation of suit, positions and articles. These are all now comprehended in the libel (14).

The positions were intended to be answered by the adversary, the articles to be proved, and what was posited could not be controverted *Qui ponit fatetur*, but neither of them were in an interrogatory form, any more than is any part of the libel in the Spiritual Court.

(14) See the practice of the Canon Law.

LIBEL.

We
Libel,
cellent
and con
ness of
the co
narratio
absolut
crimina
effect a
put in,
wherefo
costs, &
thus :
and tha
board o
to pay
his for
pending
The
when t
action ;
not vit
to supp

(15)

LIBEL.

We shall here consider the requisites to a good Libel, in considering which Gail will be an excellent guide. It must consist of a narration, and conclusion. It must be apt, and the ineptness of the Libel is chiefly to be looked for in the conclusion or prayer, which restrains the narration to what itself contains, and which is absolutely necessary in civil cases though not in criminal; but as a general prayer has the same effect as in the Courts of Equity, it is generally put in, in the same salutary manner E. G. thus: *wherefore this party prays right and justice, and with costs, &c.* or perhaps a little more particularly thus: *wherefore this party prays right and justice, and that she may be separated from the bed and board of the said A. and that he may be compelled to pay sufficient alimony to this party, according to his fortune, quality, and condition. with alimony pending this suit and costs.*

The proper definition of an *inept* Libel, is when there doth not appear therein a cause of action; if the Libel be inept only in part it doth not vitiate the whole.---The Judge is if possible to support the Libel, and interpret it favourably

(15) See Gail, lib. 1. Observ. 61. and so on.

for the Plaintiff, and when he rejects it, according to Gail he may without dismissing the Defendant, enjoin the Plaintiff to exhibit another Libel clear and properly conclusive (16).

The Libel must be clear and explicit, for otherwise how can the Defendant know how to defend himself, or the Judge how to pronounce sentence, and this is particularly necessary in a criminal suit (17). Obscurity, says Gail, may arise in a Libel, on account of its being too general, too indefinite or vague, equivocal, or alternative.

The other characteristics of a good libel, such as that it should be sufficiently certain, not idly long, irrelative, or argumentative (18), are

(16) Gail, lib. 1. Obs. 67. This must mean I take for granted, before contestation of suit.

(17) "In criminalibus libellus obscurus vel generalis non procedit etiam parte non opponente sed debet esse certi criminis loco & tempore coarctati, ita ut reus negativam loco & tempore coarctatam probare possit—aliter defensio tolleretur." Gail lib. 1. Obs. 612.

(18) There is no point in which Libels are so apt to offend as this; hence our pleadings in the Spiritual Courts often bear the resemblance rather of a lawyer's speech, than of a party's pleading; full of *invective* and *inference*, when they should contain only *averments*: and even ad-

vocates

too ob-
laughs
and eve
the Ju
though

The
libel p
who the
prepare
is the n
the disc
Proctor
that he
repeated

Cave
copy of
nant by
hibition

vocates a
they cor
to please
vices by
rection.
let the f
lative.

(19) C
(20) F
Canon L

too obvious to need discussion. Heineccius laughs at many of the clauses usually inserted, and even at the prayer for costs, which, says he, the Judge is by his office bound to decree, though not mentioned (19).

The Promovent's Proctor on putting in the libel prays the Impugnant's Proctors answer, who then prays a time to be assigned him to prepare an answer, which in the common course is the next court day, but may be enlarged at the discretion of the Judge. The Promovent's Proctor also says, or rather is supposed to say, that he repeats the libel, and prays it may be repeated *in vim positionum & articulorum* (20).

Caveators must both alledge immediately. A copy of the libel must be given to the impugnant by 2 Hen. V. stat. 1. cap. 3. but no prohibition will go to the Admiralty for refusing the

vocates are forced to bow to a prevalent fashion which they condemn, and which proctors introduced of old to please the folly of the clients, too apt to measure services by quantity of words. This prolixity wants correction. I do not mean that a pleading can be prolix, let the facts be ever so numerous, if they are really relative.

(19) On the Pandects, Part. 1, 338.

(20) For the meaning of this see *ante*, practice of the Canon Law.

copy of a libel, for the stat. 2 Hen. V. doth not extend to the Admiralty. See Salk. 553. (21).

The libel being thus filed with all due circumstances, the next step is for the Impugnant to give in his answer to it.

EXCEPTIONS, REPLICATION, AND CONTESTATION OF SUIT.

The Libel is answered in a general manner by a confession of its truth, which is called *confessing it affirmatively*, or by a general denial in the nature of a plea of the general issue, which is said *to contest it negatively* (22) : Or it may be opposed by Exceptions, in the nature sometimes of Demurrers,---at other times of pleas in Bar or in abatement, as shall be explained presently, or by pleadings filed in these courts Matters *contrary, defensive, or justificatory*, and in common parlance, any one of these is said to make a con-

(21) I have observed in the first volume on the extraordinary and I think iniquitous refusal in our law of a copy of the Indictment except in cases of high treason.

(22) The usual form of contesting it negatively is, *admit the same as far as, &c. &c. and contest the rest negatively*, A. B. Advocate.

The &c.s means as far as it makes for, or is favourable to my Client.

testation,

testati
think

If t
moven

pleads

in an e

ther pe

it mul

face of

the ex

swers t

a speci

If it

for the

ings, o

amount

to a de

a plea

rious pl

the gen

tion int

In m

pleading

those k

justifica

(23) S

VOL.

testation of suit (23), though as I have said, I think less accurately.

If the Impugnant neither confesses the Promovent's libel, nor contests it negatively, i. e. pleads the general issue, he probably then puts in an exception, which exception may be either *peremptory* or not; if it perempts the suit, it must do so either for cause apparent on the face of the libel, or for cause first appearing in the exception itself. In the first case it answers to a general demurrer,—in the latter, to a special plea in bar.

If it doth not perempt the suit, but excepts for the defect of form in the Promovent's pleadings, or for matter set forth in itself but not amounting to a bar, it answers in the first place to a demurrer for want of form, in the latter to a plea in abatement. But still to all these various pleadings the Civil Law has assigned only the general name of *exception*, with a distinction into those *dilatory* and those *peremptory*.

In modern practice indeed more names of pleadings have been introduced over and above those known to the ancient. If the plea be a justification it is called a *matter justificatory*—if

(23) See *ante* note to page 27.

it be of an excusing nature, and contains much defence, but does not amount to a full justification, it is called a *matter contrary and defensive*, and if it denies the fact not generally but specially setting forth special circumstances it is called a *matter contrary* only (24).

To illustrate all these by example: if in a suit for jactitation the party can positively deny the fact, he *contests the libel negatively*; but suppose in a suit for jactitation of marriage that it appeared on the face of the Promovent's libel

(24) The Reader may remember the distinction of the ancient Civil Law between *exceptions* properly so called and *defences*, ante note to page 33; it doth not seem however perfectly to tally with the distinctions above, which I have not taken from books but collected from my own observation.

Pleas in *excuse* or in *justification* are so common in law, (though they have not been so strongly distinguished from other pleas as in the Ecclesiastical Court) that the above distinction wants no comment. I will not say that the above distinction between matters *contrary*, and matters *contrary and defensive* is accurately observed, but it seems to me the true one. A pleading is sometimes called a matter *peremptory and defensive*; for instance, a woman institutes a suit for a divorce on account of cruelty and for alimony, the husband may plead adultery in her which *perempts* her demand for alimony, and in some measure *excuses* or defends his harsh behaviour.

that

that he had no cause of suit, a *peremptory exception* in general terms, in the nature of a general demurrer, might be put in by Impugnant.

If on the other hand the libel was perfect, but a bar is started by the Impugnant, as for instance that the cause was substantially tried before in a suit in which the present Promovent might have intervened, the objection is urged in a pleading called also a *peremptory exception*, but in the nature of a *plea in bar*.

If no such objections are in the power of the person of the Impugnant, he may perhaps find defects in the form of the libel, E. G. for omitting the setting forth of time and place, or of annexing documents therein referred to, and mark them by an *exception*, not called peremptory, but simply stiled an exception, which is in the nature of a demurrer *for want of form*. Or he may possibly object to the jurisdiction of the Court, or plead that the Promovent is a minor not competent to institute a suit, by *exceptions* in the nature of *pleas in abatement*.

But now let us revert to the second case, and suppose that the Impugnant has a plea in bar, and that it not only perempts the suit, but amounts to a justification, E. G. that he had a right to Jactitate for that a marriage had ac-

tually taken place, he probably instead of calling his plea a peremptory exception, will call it a *matter justificatory*; if on the other hand he cannot justify, but has matter of excuse, E. G. that he did not boast or Jactitate in order to hurt the good name of the Promovent, but at her own earnest request and desire, it will be called a *matter contrary and defensive*.

If after all Impugnant finds he has no occasion to have recourse to any of these defences, and is able to deny the fact but fears that upon such a general issue, he shall not be enabled to give in evidence special facts, supporting his denial, and making the charge of Promovent impossible or improbable, he may put in simply a *matter contrary* (25).

The

(25) This last instance may perhaps be better illustrated in some other suit. Suppose in a suit for restitution of conjugal rights, the Impugnant wishes not only to deny his marriage, but to shew the improbability of such a marriage from the mean situation of the other party. Suppose in a suit for tithes, insisting upon a usage, he might wish not merely to deny the usage, but to shew something quite inconsistent with such an usage. Again suppose in a suit for a divorce for cruelty and expulsion from the husbands house, the husband should plead cohabitation, and that the wife had come back and cohabited,

The
which
ing to
contest
ception
Demur
a plea
may pe
it on h
he may
decease
she was
A. rep
special
In t
we fin
(26) an

bited, an
from no
in a diff
bare de
circumf
tion ma
contrary
tion. I
it. In
these m
(26)

ECCLESIASTICAL COURTS. 109

The Promovent is now called upon to reply, which he may do in various ways: he may according to the case think proper to plead and contest the admissibility of the adversaries' exception, which may be compared to joining in Demurrer; or if it has been in the nature of a plea in bar, he may contest it negatively, or may perhaps put in a peremptory exception to it on his part, in the nature of a demurrer; or he may literally *reply*, as if the will of a woman deceased be alledged, B. may possibly plead that she was married, and could not make a will.---- A. replies that the marriage was void: but such *special replications* are not frequent.

In the old books of Roman and Civil Law we find mention of duplications, triplications, (26) and quadruplications, answering to rejoinders,

bited, and if she really had returned to the same house from necessity but not *animo cohabitandi*, and had lived in a different wing of the house and never seen him, a bare denial would never do, without explaining all the circumstances by a contrary matter; and here a question may occur, whether after a negative contest, such a contrary matter may be added upon further consideration. It may be awkward, but I see no inconsistency in it. In old pleadings as I find by the Registry books, these *matters contrary* are sometimes stiled *allegations*.

(26) Names formerly of pleadings of English Law;
see

ders, rebutters, and surrebutters, but they are not in use.

The pleadings being arrived at their completion, the parties must at length have come to a direct issue or contradiction, not with the strictness of our legal pleadings which require an issue upon a single point, (though that point need not consist of a simple fact,) (27) but to some general denial and contradiction made by the last pleader of the exception, replication, or other matter immediately preceding—*Status questionis*; *Judicii suscepti utrinque facta est professio*, i. e. the parties have agreed what is the question really to be tried, and are ready to go into evidence; and here again the ambiguity of the terms I have so often alluded to occurs, and the parties are frequently in the books said at this stage to have arrived and not before, at the *litis contestatio* (28).

THE

see ante p. 37. To go beyond a duplication was bad pleading. I have among other precedents one instance of a duplication, but I never knew one in practice.

(27) Burr.

(28) It is very remarkable that Oughton gives no express chapter on these pleadings, nor any aid to the analysis of them, nor treats of exceptions except those

to

THE SECOND STAGE OF THE CAUSE
IS FROM CONTESTATION OF SUIT
TO CONCLUSION.

ADDITIONAL ALLEGATIONS.

The suit is now completely contested and the parties ready to proceed to proof, but as I have hitherto for the sake of simplicity considered the Promovent as having only a right to put in one allegation (as a Plaintiff at Law files but one declaration) and as he has a right by the

to *testimony*, so that I have been obliged to depend on observation and reflection without any assistance from books. Oughton merely treats of the general negative contest to the Plaintiff's libel, which is the only thing that he professes to mean by contestation of suit; and Heineccius, though he admits that these words are sometimes used in the sense mentioned in the text above, evidently considers that as an abuse of the words. I mention these words for the last time, but many disputes may arise upon them, E. G. if the rule of our law be the same with the Civil, that no dilatory exception can be put in after contestation of suit, it becomes

the course of the Court to put in three, each supporting and strengthening the preceding, it is necessary to observe that whatever has been said hitherto of the one libel must be considered as applying to each of these three, when they are put in; to explain this further, the Promovent having received light from the pleading of the Incumbent amends his bill, to use a phrase familiar to the Equity Lawyer, i. e. he files a second allegation (for this part of the proceedings may be more justly compared to those in our Equity Courts, than in those of Law) and in the same manner he may file a third; but he can go no further, though one would imagine from what is said by Oughton in the notes to titles 112 and 113, that formerly he could.

But though in some respect a comparison may thus be made with amended bills in our Courts of Equity, in others the comparison totally fails. The opposite party always pleads to these allegations; and though he may be also called on to answer them article by article, never doth so unless particularly required, so that upon the whole

comes important to know when that takes place. *Quæ*, after all, whether our suits in these Courts may not resemble the actions *bonæ fidei* of the Romans, in which all this strictness was unnecessary.

the

the practice widely differs from that of the Courts of Equity (28).

When the custom of putting in these additional allegations originated I know not, for we find no mention in the ancient Civil Law of more than one *libellus*, and indeed in strictness of speech I conceive still, that the first pleading or charge of the Plaintiff or Promovent, is the only one properly called the *libel* (29). I can
as

(28) In one respect it hath a manifest advantage, the power which each party hath to demand the answer of the other to every pleading that is put in, whereas a Defendant in Chancery cannot procure the answer of the Plaintiff to any new matter or allegation brought forward by him in his answer, without filing a distinct allegation, viz. a cross bill. The late Dr. Radcliff, whose practice had been entirely in the Common Law Courts (where he arrived at the first eminence) until he was made Judge of the Prerogative, often told me, that in his opinion (and his opinion could not be biaffed that way) the method of investigating and coming at the truth in the Ecclesiastical Courts was preferable by far to any that he knew.

(29) I consider the libel as the declaration or bill of complaint. The additional allegations do not charge new or distinct causes of suit, but only new circumstances and additional facts in confirmation of the original cause of action. *Allegation en termes de Palais est*

as little find when the number was limited to three, for as I have observed Oughton seems to speak of the number, as only limited by the discretion of the Court, or in consequence of some rule served upon the adversary (30.)

The Defendant or Impugnant has also a right to put in three defensive pleadings, but in testamentary and administration causes both parties are Actors or Plaintiffs, as at law in a replevin cause, and therefore you do not in them hear of *defensive matters*, &c. &c. but each party puts in or may put in three *allegations*. The husband charged with cruelty, or the wife with adultery are to *defend* themselves, but the party setting up a will, and his opponent setting up intestacy

la citation d'une autorité d'Appuyer une proposition. Encyclopedie of Diderot and D'Alembert of Paris 1751.

Allegationes partium—*rationes* quas Reus & Actor producant; hinc nata *nostris* vox familiaris *alleguer* de eo qui instrumenta vel *testes* vel *rationes* pro suo Jure tuendo profert. Du Fresne's Glossary. The word comes not from *allegare* which is *ad alium mittere*, but from *allegare*, i. e. *ad ligare* to tie or annex to.

(30) Est & alius modus refrænandi has *secundas*, & aliquando etiam *tertias* & *quartas* propositiones materialium, five allegationum; tit. 112. note. The two methods appear by that and the following section: 1st. petendo expensas retardati processus; 2d. assignando terminum infra quem—ad amputandas dilationes, si multiplicentur allegationes.

are

are both Plaintiffs, and *Claimants* of deceased's property upon different grounds.

PERSONAL ANSWERS.

We must also before we proceed to depositions or proofs by witnesses, consider Personal Answers which may prevent and anticipate the necessity of such proof. The suit which hitherto may have been compared to one at Law rather than in Equity, here assumes the latter form; for the Promovent is at all periods of the cause after contestation, even down to the hearing, entitled to the aid of Impugnants answer upon oath, and if it be refused or delayed he proceeds with nearly the same process of contempt to enforce it, as was used to enforce the party's original appearance; with this difference, (31) that where he is excommunicated for not answering, I have heard it said there is no occasion for a citation to all effects, previous to proceeding with the cause, but I think the contrary.

(31) In fact each party is entitled to the answer of the other upon oath to every one of his pleadings, but to avoid complication and confusion, I have simplified the subject by considering only the Promovent and his libel. It is easy to generalise the rules above.

The Impugnant of course cannot read his own Personal Answer, but if the Promovent reads part of the answer to any one article, the Impugnant has a right to read the whole of the answer to that article.

Exceptions may be put in to these personal answers, as to an answer in Chancery, for being short, impertinent or scandalous.

PROOFS AND DEPOSITIONS.

When the party from the stage of the cause is called on to proceed to proof, a term probatory is granted, within which witnesses are to be produced, which by the course of the Court lapses, or is terminated on the next Court day; this is thrice repeated, so that the three probatory terms would by the stile of the Court lapse on three successive Court days, if they were not continued (32) which they almost always are, and that for a considerable space of time, since in scarce any instance could it be possible for the

(32) This is done for a reasonable and proper space of time, till the witnesses are examined, merely by the Proctor, (when the register mentions the state of the cause) praying to continue, until the opposite party, or the Judge object to any unreasonable delay.

party

party to bring up witnesses perhaps living at a great distance, nor for the examiner to examine them, within the ordinary Curial terms. The term probatory is common to both parties, i. e. each may examine during the time granted to the other, and as long as it continues; and there are three terms probatory granted on the putting in each and every one of the three allegations or pleadings which each party is at liberty to put in or file, during which terms probatory each party is at liberty to produce witnesses, not only to the matters in the last allegation put in, but also to those in all the preceding allegations, so that until publication, and as long as any term probatory is in existence, the whole cause and all the contents of all the allegations are open to proof.

The term probatory runs if the party who prayed it is delayed for want of the personal answer of his adversary, only from that answer coming in; and though it may have lapsed, yet for special cause the party will be restored to a term probatory by the Court: on the other hand if the party obtaining it afterwards should change his mind, and think it unnecessary to examine further witnesses, he may renounce it; except it has been granted in pain of the opponents contumacy who absents himself,

self, or except the other party has accepted it and protested of using it as common to both, unless he so accepts it merely for delay, and afterwards doth not examine witnesses in which case he must pay costs of process retarded (33).

The witnesses must be summoned to attend, either personally, or if they cannot be found by a citation *viis et modis*, and their expences offered them, (34) and if they refuse may be excommunicated; but if they live out of the jurisdiction of the Court, a requisition must go to their own proper Judge to examine them. The probatory term is naturally continued by contumacy of the witnesses to give time to subdue it, but if the Judge has reason to think that their absence is the effect of any collusion or trick to delay the cause, he may proceed to conclusion; but yet if they afterwards appear, and are absolved, and their contempts purged, conclusion is rescinded, and they may be examined (35).

The witnesses not contumacious are produced in Court within the probatory term and sworn,

(33) See Oughton tit. 75.

(34) This viaticum by the course of the Court is usually from one to four shillings a-day while delayed and four pence a-mile while on the journey.

(35) Oughton title 78.

or if at a distance, a Commission issues to examine them (36). On their production, Oughton gives particular directions about the adversaries dissenting to their production and protesting of its nullity, which in practice is not now done, the adversary merely swearing them to give true answers to his queries, in case he means to cross-examine them. Oughton says that the Judge admonishes them to appear to be examined before the next court-day, or within some competent time, but neither is that the modern custom (37). The party producing them gives notice to the opponent of the articles of his libel, to which he intends to examine them.

The witness produced becoming thereby common to both parties, the adversary may administer to them interrogatories which he must do with-

(36) Oughton says in a note, title 80. though the witnesses must be *produced* within the probatory term, they may be *examined* after it has lapsed, and so is the practice. All that is necessary, is to produce them within the time.

(37) The Court usually admonishes them, that they must attend the Examiner of the Court to be examined, and that the Examiner will give them due notice of the time.

in

in twenty-four hours, unless further time be granted (38). A copy of the interrogatories according to Oughton is not to be given to the opponent, and this cross-examination doth not preclude objections to the witnesses (39). The party producing them cannot impeach his own witness, inasmuch that though he may afterwards chuse to waive their examination, yet he cannot prevent the opposite party from cross-examining them.

The witnesses are to be secretly and separately examined, not in the presence of the parties or other witnesses. Their depositions after being read over to them, article by article, and they asked whether there be any thing which they wish to alter or amend (40),---are then to be signed by the witness, and he afterwards repeated before the Judge, i. e. asked again in the

(38) Each party of course may read the evidence given by his witnesses as well as those of his adversaries on their cross-examination.

(39) i. e. As I conceive to their sayings, for I apprehend he cannot afterwards object to their persons. Oughton thinks that interrogatories more frequently prejudice than assist the party offering them.

(40) How much is this preferable in some respects to an examination at Nisi Prius, where every incautious or

hasty

the ope
any thi
This is
the ex
always
presenc
If th
age or
though
or I su
and ex
they li
by Co
they ar
requisit
diocese
or hav
mutue
thus g
diction
I sha
the dic
hasty in
insisted
a partic
rication

the open Court by the Judge, whether there be any thing which he wishes to correct or alter. This is indispensably necessary, because though the examination is before the Examiner, it is always presumed, says Oughton, to be in the presence of the Judge.

If the witnesses through illness, imprisonment, age or infirmity are incapable of attending, although resident, the Judge or his Surrogate, or I suppose the usual Examiner may attend and examine them at their own houses; and if they live at a distance they must be examined by Commission proceeding from the Judge if they are within his jurisdiction, otherwise letters requisitory must go to the Bishop within whose diocese they reside requesting him to examine or have them examined, as it is called, *sub mutue vicissitudinis obtentu* from the mutual aid thus granted by the several Ecclesiastical jurisdictions.

I shall first consider commissions issuing within the diocese where the cause arises. These commissions, if hastily impressed, is instantly bellowed to the Jury and insisted upon, without giving time to the witness to correct a particle, or if he attempts to do it, perjury or prevarication is immediately charged on him.

missions used to issue to such persons as the Judge might please, two or more being usually nominated to him by the Proctors of each party, for his approbation, originally Ecclesiastics but latterly very often laymen, empowering them jointly and severally (41) to sit and examine, at an appointed time and place (42), assuming to themselves an Actuary i. e. a Registrar, properly among the Notary Publics, with a term assigned for transmitting or returning the Commission, and the term probatory is to be continued untill the day of the return, and proper notice (43) given to the opposite party of the time of opening and proceeding on the Commission.

Such was formerly the practice, a practice which Oughton himself observes is fraught with many mischiefs, inasmuch as the Commissioners so nominated will naturally make themselves parties, and be in danger of not examining in-

(41) Such is the tenor of Ecclesiastical Commissions in general, except to the Court of Delegates, whose Commission runs *to you or two or more of you so that one could not proceed.*

(42) The place properly a church, now improperly very often an inn. The place if in foreign parts cannot be so definite.

(43) Which is three days according to Oughton. differently

differently and deviating into perpetual contests (44). The wisdom therefore of Judges in Ireland, and I take it for granted in England, has taken a hint from the suggestions of Oughton, and has within these few years ordered that no Commission should be directed but to an Officer of the Court, and that the Proctor of either party, if he chuses to have the Commission attended, must do so either in person, or by a substitute who must be a Proctor (45).

When Commissioners used to be appointed, the Commissioners being assembled at the appointed time were to accept the Commission,

(44) *Partes solent nominare Commissarios sibi amicos, & ita communiter non dicuntur Commissarii Judicis sed partium; & gerunt se ut partes*, tit. 86. sec. 8. and read his note to the same section.

(45) A Proctor can here then appoint a substitute. I have said before, that strictly speaking, a Proctor cannot appoint a substitute till after contestation of suit. This means however where he has no special authority for so doing, but usually in their original general proxy, they have such a special clause empowering substitution *ab initio*.

If the Proctor disobeys such an order of the Court as above he may be suspended, and it is to be noted, that a Proctor of Doctors Commons suspended cannot have a mandamus to restore him. See 3 Bacon's Ab. 531. and Burn. title Proctor.

(and though some were absent they might subsequently accept it,) and to appoint an indifferent person Actuary, usually a Notary Public, and to take care that one should not be imposed on them by the party bringing down the Commission partial to himself. Now that an Officer of the Court examines, who is probably a Notary Public himself, it is often thought unnecessary to assume an Actuary (46).

The opposite party may join in the Commission to save expence and examine his own witnesses under the same; when the Commission goes down he may administer interrogatories, or if he does not chuse by his Proctor to be present, he may at the time of speeding the Commission deliver in his interrogatories to the Register, not to be shewn to any person until the Commission be opened; but if afterwards he chuses to be present by his Proctor, these interrogatories may be substracted and new ones administered:

(46) The delay and expence of the old method of appointing Commissioners was to my knowledge extremely grievous. The present mode is a wonderful saving to the suitor, while at the same time his business is much better done, by an Examiner and Proctors well acquainted with the rules and practice of the Court, in which the blunders of strangers to it were innumerable and infinitely mischievous.

if no interrogatories be previously prepared, he usually gets a reasonable time from the Commissioners below to prepare and bring in interrogatories, having only 24 hours in strictness.

If the adverse party doth not appear at the time of speeding the Commission, he is to be thrice publickly called, and every thing is to be done in *Pænam Contumaciæ in pain* of his contumacy; and Oughton thinks that if he doth not chuse to be present he ought to take care at the time of granting the Commission, to protest of nullities for that otherwise he cannot afterwards except against the witnesses, Tit. 86, sect. 11.

The Certificate of the execution of the Commission is to be directed to the Judge, subscribed and signed by the persons appointed to expedite the Commission, and containing all the Acts done by virtue thereof. Every leaf of the depositions should be subscribed not only by the witnesses but also by the Commissioners, and the whole carefully sealed up with an authentic seal until produced in the Court from whence it issued, and aperture there prayed.

The manner of executing a commission to examine witnesses in another diocese, (for no man can be cited to appear out of his own) doth not materially differ, except that it must issue
and

and be directed to the Bishop of that diocese, or his Vicar General and Official Principal, and be attended with letters requesting or praying them to compel the witnesses to appear at a time and place which must be named in the requisition, to examine these witnesses, and transmit the depositions (47).

If the Commission is to be executed in foreign parts it may perhaps be directed to the principal Magistrate of the place, or his Deputy, and in such case, as it is difficult to ascertain the exact time, the Commission may be more indefinitely directed to be executed between such a day and such a day, giving due notice a certain number of days before, to the opposite party.

PUBLICATION.

Whenever the Proctor of either party doth not intend to produce or examine any more witnesses, he may pray Publication, which sometimes on special circumstances is prayed saving the examination or repetition of some particu-

(47) I have known a Register of one diocese, examine by consent in another, but then he could have no power or process to compel witnesses.

lar witness. Publication may be stayed on sufficient cause at the prayer of the opposite party, and putting in a new pleading upon his part (if the whole number allowed him be not out) is always sufficient cause and stays it of course; so that where each party chuses to put in their three pleadings, and are ready with them, publication cannot pass till they are all exhausted and the witnesses to them examined, but the party which prays to stay publication, must be ready with his pleading at the time it is prayed; it is for the Court to determine whether publication be unreasonably or designedly delayed, or Commissions tediously or improperly executed, and to act accordingly.

Publication having passed and copies of the depositions being given out, if the witnesses have not fully answered to interrogatories, the Court will oblige them to answer more fully; if other exceptions appear to the testimony, the parties will offer them. These *Exceptions to witnesses* are either general or special, the former offering general objections, the latter specifying particular facts, causes, and reasons of exception; and each of them may be to the *persons* as that they are of infamous character, or to the *sayings*, that they are contradictory, repugnant, or

or *extraarticulate*, (48) and the party may, faith Oughton, demand the oath of calumny or malice (49) from him who excepts generally, to oblige him to shew that he doth not except for the sake of delay.

Probatory terms are granted on these exceptions, and Commissions to examine as in the principal cause.

The party to whose witnesses exceptions are made may bring others to *corroborate* them, and may also impeach the witnesses produced to support the exception, who are called *reprobatory* of the original ones, by others *reprobatory* of them, but the contest can go no further, according to the adage.—*In testem testes, & in hos sed non datur ultra.*

(48) The objection to *extraarticulate* depositions is evident. The other party thus cannot know to what the witnesses have been examined, and therefore cannot properly cross examine them—giving him a copy of the articles to which they are to be produced is so of little use to him. The examiners are very faulty when they suffer it.

(49) The form of the oaths of calumny and malice is found in Oughton, Burn, &c. I have never known them in practice, yet I have heard it said from high authority that they may still be administered, not only to Proctors, but even to Advocates—*sed quere.*

Instrumenta

Except documents
bel, shou
suit; in g
time befo
quently d
allowed t
alleged l

Publica
known, i
vene, or
Term to Pr
term limit
upon, if h
make, to b
has passed
fence to m
without fr

(50) The
his witness
whom specif
ton in a note
(51) They
tant words,
place.

VOL. II.

Exceptions (50) ended, *instruments* or written documents remain, which if alledged in the libel, should be produced before contestation of suit; in general they may be produced at any time before conclusion, or afterwards if subsequently discovered (51), and I have known them allowed to be produced at the hearing though alledged long before.

TERM TO PROPOUND.

Publication being passed and the depositions known, if no exceptions to witnesses intervene, or if they have been disposed of, the *Term to Propound all things* follows; which means a term limited within which the Defendant is called upon, if he has any further proof or defence to make, to bring it forward: if then after all that has passed, the Impugnant has any further defence to make, new witnesses lately discovered without fraud or covin to introduce, or real ob-

(50) The party excipient however may corroborate his witnesses also. Corroboration cannot aid those to whom specific objections have been put in, says Oughton in a note to title 102.

(51) They are usually alledged with these concomitant words, *which he protests of exhibiting in due time and place.*

jections to make to those of his adversary which he could not make before, he may still do it; but if he attempts any thing of this kind with intentions of delay, the sagacity of the Judge will induce repentance on him, in a load of costs: and if on the *day assigned to propound all things* he has no new defence or objection to make, *Conclusion* follows: This term to propound all things, Oughton admits is not a creature of the Ancient Law, but an invention and usage of Judges in later times.

CONCLUSION.

Conclusion also Gail admits not to be *de substantia Juris*, or known to the Civil Law, though perhaps it was to the Canon: it is however plainly conformable to good sense to put an end and conclusion to the suit, *malgré* any litigious perverseness of the parties (52); and accordingly

conclusion

(52) So says Oughton, but in practice I have known them constantly, if records of courts such as bills in Chancery, or public instruments, produced at the hearing upon leave obtained; on condition sometimes of alleging them, that they may be impugned by the opposite party.

(53) The tediousness of suits in the Ecclesiastical Courts is a common and trite topic of abuse. I scarcely

ever

conclusion forbids the filing any further allegations, or adducing any further proofs even by instruments, except as far as leave is reserved to exhibit them at the hearing: and when *conclusion* takes place, the Judge is prayed to *assign* a term to hear sentence and to inform on the next court-day, on which day or as soon after as the Judge may please, he hears the cause, Advocates state the case on both sides, the depositions are read to him, council (54) are heard to evidence, and the Judge is ready to proceed to sentence.

To hear this sentence, by the ancient practice a citation issued to the unsuccessful party, but now, when he has once appeared, he is merely called, and sentence passes in pain of his contumacy.

Never knew any one of them even the most complicated, last two years. How few Equity suits are so soon over. The greater part of the world merely repeat like parrots what they hear others say; few think or observe for themselves.

(54) The Common Lawyers, though not allowed to sign pleadings, are admitted to speak in these Courts, in Ireland; for in that kingdom the Common Lawyer is not much distinguished from the Civilian: multiplicity of business has not produced division of labour.

THIRD STAGE OF THE CAUSE— TO ITS TERMINATION.

SENTENCE—EXECUTION.

Conclusion having passed on the day assigned to conclude, the Promovent prays a term to be assigned to hear sentence, and to inform viz. on the next court-day, on which day information being given to the Judge, i. e. he having heard the proofs read, and the statement and arguments of Council or Advocates, proceeds as soon as he is satisfied, to give sentence (55) which is offered to him in writing by the Proctor, signed by an Advocate, and if approved is then signed by the Judge. As to execution

(55) The order then of rules from publication, if no particular obstacle be interposed, is thus :

1. Publication decreed.
2. The Judge assigns to *propound* all acts next court-day.
3. On that day all acts being propounded, Judge assigns to *conclude* unless cause next court-day.
4. On that day conclusion decreed, and Judge assigns to hear sentence and to inform on next court-day.

5. On

cution every one knows that where the sentence doth not execute itself, if it be disobeyed, the Ecclesiastical power is only that of excommunication, in which it is supported and rendered formidable by the aid of Chancery, granting where the party continues obstinate the writ *de Excommunicato capiendo* : concerning which, I shall only observe, that all the churchmen insist that this is a writ *ex debito Justitiæ*, though my Lord Coke says it is only *ex gratiâ*. But at all events, the Bishop's *significavit* must shew sufficient cause.

When it appears to a third person that his interest is any way concerned in any cause, he may *intervene* proving his interest. This he may do in a matrimonial cause at any time, but in general he must proceed in the same state in which the cause was when he intervened.

I shall only here add, that if the Impugnant in a criminal cause has any counter charge to make against the Promoveant, it ought to be re- criminated by way of what is called *reconvention*. Thus, if in a cause of defamation, the Impugnant can retort the charge of defamation on the

5. On that next court-day, information and sentence. Such is the scheme of Oughton, but in practice in Ireland there are three assignments to hear sentence, in plenary as well as in summary causes, as will be seen presently by the rules in *Maddock v. Logan*.

other

other party—if in a cause of divorce for adultery, the wife denies the charge, but in her turn seeks a divorce for cruelty---she reconvenes the Promovent, and files what is called a reconventional matter (56).

Having now done with *Plenary* Causes, (57) I am to proceed to *Summary*, but as those of a Summary

(56) To *convene* in the Roman Law was a technical term signifying to bring an action.

(57) I shall further illustrate the practice in a plenary cause, by the actual rules in one strongly contested.

MADDOCK v. LOGAN.

Citation. Certificate of the execution thereof continued. Promovent filed a libel *. Impugnant exhibited a justificatory matter. Promovent admitted the same as far as, &c. under protest of excepting. Impugnant prayed Promovent's personal answer to the articles of his justificatory matter—decreed accordingly. Impugnant also examined witnesses to his justificatory matter, and they were cross-examined.

Then the Promovent put in an additional allegation, which the Impugnant contested negatively, then the Promovent moved for the personal answer of Impugnant to Promovent's additional allegation.

21st April, publication decreed.

5th May, assigned to propound all things.

* To continue a certificate of execution is to give further time to execute and certify. Every citation must be returned in the term in which it issues, or the next.

a Summ
are but
head of

9th May
to conclude

26th Ma

this day, w

ed to be ad

16th Jun

refused, an

cause next

20th Jun

prayed libe

fixed.

23rd Jun

atory mat

contested m

Promovent

matter.

July 4th,

justificatory

It was t

and ordered

July 7th

against con

assigned to

matter. A

the Judge

decreed concl

a Summary nature in the Consistorial Court are but few, I will treat of them under the head of

PRERO-

9th May, all acts being propounded, Judge assigned to conclude unless cause next court-day.

26th May, Judge assigned to conclude unless cause this day, when Impugnant on petition and affidavit, prayed to be admitted a pauper.

16th June, That motion was heard, and the petition refused, and then the Judge assigned to conclude unless cause next court-day.

20th June, in opposition to conclusion Impugnant prayed liberty to *alledge* a letter and paper writing affixed.

23rd June, Impugnant exhibited an additional justificatory matter with two instruments annexed; this was contested negatively, and then the personal answer of Promovent also ordered to this additional justificatory matter.

July 4th, personal answer given in to the additional justificatory matter.

It was then prayed again that conclusion might pass, and ordered unless cause next court-day.

July 7th being next court-day, Impugnant, as cause against conclusion prayed that the term of law might be assigned to him for proof of his additional justificatory matter. And affidavits being read for the Promovent, the Judge refused to assign the term of law, and decreed conclusion and assigned to hear sentence on the first

PREROGATIVE COURT.

In this Court (which is confined to testamentary and administration causes except as matrimonial may come in incidentally, and that only where there are bona notabilia, viz. to the value of five pounds in different dioceses) all proceedings are said to be Summary, as they are also said to be in the Court of Admiralty.

The strict description of a Summary Cause is that in which it is not necessary to give in a libel, but you may libel *viva voce* at the acts, and pray to proceed Summarily; and the Proctor for the Impugnant is to dissent, and this *imports* Contestation of Suit, for *express* contestation is not necessary; and in which there is no assignation to *propound* all things, nor assignation to *conclude*, nor *express* conclusion. To part of this description causes in the Prerogative do not strictly answer, since the pleadings are in writing, and the depositions taken down in writing.

first assignation next court-day. Impugnant's Proctor dissenting and protesting of grievance and of appealing.

Nov. 7th assigned to hear sentence on the second assignation next court-day.

Nov. 10th. assigned to hear sentence on third assignation, and to be informed next court-day.

Nov. 17th Information and sentence.

ing as
ty conte
other, fo
of the p
except t
and both
ed, you
&c. but
to concl
for after
a term t
the first
next day
2nd. affi
cause she
inferred co
assignatio

CORRESP

(58) Plena

The day app

The day affi

Assigned to

inform.

CO

Plen

All things pre

—Conclusio

1 Assigned to

2 Assigned to

3 Assigned to

inform.

VOL. II.

ing as in the Consistorial Court, and each party contests in writing the allegations of the other, so that great part of what has been said of the practice of the Consistorial applies to this, except that all the causes being testamentary, and both parties Plaintiffs, and no offence charged, you will not hear of matters defensive, &c. &c. but as there is no term to propound, or to conclude, they are justly called Summary: for after publication passes, instead of praying a term to propound all things, the party prays the first assignation to hear sentence, and on the next day instead of a term to conclude, the 2nd. assignation to hear sentence, and if no cause shewn on that day, there is an *implied* or *inferred* conclusion, and the party prays the 3rd assignation and to inform (58).

CORRESPONDENT STAGES ACCORDING TO OUGHTON.

(58) Plenary.

Summary.

The day appointed to propound.	1 Assign. to hear sentence.
The day assigned to conclude.	2 Assign. to hear sentence.
Assigned to hear sentence and to inform.	3 Assign. to hear sentence and to inform.

CORRESPONDENT STAGES IN PRACTICE.

Plenary.

Summary.

All things propounded.	1 Assign. to hear sentence,
—Conclusion.	2 Assigned to hear sentence.
1 Assigned to hear sentence.	3 Assigned to hear sentence and to inform.
2 Assigned to hear sentence.	
3 Assigned to hear sentence and to inform.	

A P P E A L S.

An Appeal is either from a *grievance*, or from a *definitive sentence* or interlocutory decree having the force of a definitive sentence.

If the party against whom sentence has passed find himself aggrieved, and if that grievance appears on the face of the proceedings, he brings a *Querele* of nullities, but here he can produce no new matter; if he be aggrieved by matter extrinsic, he *appeals* (59), and then is allowed *non allegata allegare, & non probata probare*.

(59) The first kind of Appeal, viz. from a *grievance* must be made in *writing*, and must specifically contain the circumstances of the grievance, as if proper testimony has been refused or improperly admitted: The names of the witnesses, and the matter of their evidence must be set forth, and the Appeal must be interposed within ten days, for it has been doubted whether the statute 24 H. VIII. ch. 12. which speaks of 15 days, applies to Appeals from Grievances, and in Ireland I apprehend there is no such statute, and therefore the rule of the Civil Law, which gives 10 days, must here govern*.

The second kind of Appeals, viz. from a definitive sentence may be *viva voce* in the presence of the Judge *apud acta* at the time of the sentence, or in writing before a Notary Public within ten days, or in England by statute within fifteen.

* It was so determined by the Delegates about three years since in Lecky and Cave, where an attempt was made to construe the law of Ireland otherwise.

If he appeals *apud acta*, he at the same time prays Apostles, i. e. short letters dimissory signed by the Judge, stating shortly the case and the sentence, and in the room of further Apostles, declaring he will transmit all the proceedings.

If before the *sentence given*, the Judge, in the course of the cause, induces by his acts any grievance upon either party, as by his rejecting valid witnesses or proper allegations, that party may appeal.

If the party or his Proctor doth not appeal
apud

The mode of proceeding in an Appeal from a grievance follows the nature of the original cause from whence it springs, i. e. it is plenary or summary, accordingly as was the original cause, excepting that before the Delegates *all* causes are *summary*, and that in a cause of grievance, it is not allowed *non allegata allegare*, and *non probata probare* as in Appeals from a definitive, with some few exceptions, for which see Oughton, tit. 318.

This remarkable rule of *non allegata allegandi*, and *non probata probandi*, has always this tack to it, *modo non obstat publicatio testium*. The new allegation or proof therefore must be something which could not have been suggested or occasioned by the evidence already published; yet what room for controversy is here! Deeds and written instruments are usually admitted; yet may not a party have been prompted to forgery as well as perjury by

apud acta, he may, dissenting at the time of sentence, afterwards appeal *in scriptis* (60), within ten days in Ireland, 15 in England, by going before a Notary, who draws up an instrument of appeal, continuing a short account of the nature of the cause and the sentence, signs it before witnesses, and puts his seal to it, and thus it becomes authentic.

seeing the strength or weakness of his own or adversary's cause below; the best account I know of this rule is in Farinacius de testibus: the rule in our house of Lords is the converse, see Brown's Cases in Parliament, v. 1. p. 70.

It is a practice unknown to our law (though constantly followed in the Spiritual Courts) when a superior court is reviewing the sentence of an inferior, to examine the justice of the former decree, by evidence that never was produced below, 3 Bl. Comm. p. 455.

(60) It is incumbent on the Proctor to appeal in one of these ways, unless otherwise directed by his client, for if he omits to appeal from a definitive, and any damage thence ensues, he is liable to an action from his client.

Appealing *apud acta* may sometimes be very necessary, as for instance to prevent a person who has got administration by sentence from instantly intermeddling with the effects. At other times it may be expedient not to appeal *apud acta*, as if it be apprehended that the Judge will assign too short a term to retrocertify, see Oughton, title 294. For the advantage of appealing in writing, *in scriptis*, from an interlocutory having the force of a definitive sentence, see Oughton, title 295.

At

At the time when apostles are prayed, and granted, a time is appointed within which the party is to retorcetify to the Judge *a quo* what steps he has taken, who otherwise will proceed to execute his sentence. The Apostles when granted, (61) (if it be an appeal from a Metropolitan or from the Prerogative Court), are carried to the Lord Chancellor's Secretary, and upon the back of them the Chancellor names Commissioners, or Judges Delegates, and the Commission being made out, two of them at least must accept it, which they having done, issue an *inhibition* to the Judge below to stop all further proceedings, and a *monition* to transmit all the past proceedings in the cause to them, which is done accordingly, and this *transmits* serves in the room of further Apostles.

If the appeal be from a Diocesan to a Metropolitan Court, the Apostles are in the same

(61) If the Appeal be in writing, which it always is, if from a grievance, there is no occasion for Apostles, as the instrument of Appeal itself contains the whole matter of complaint, and where notice is given to the Judge of such an intended Appeal in scriptis, he cannot put a rule upon the party to prosecute and retrocertify until after the time for appealing is out. The manner of obtaining a Commission of Delegates described by Oughton is somewhat different from that above.

manner

manner carried to the Archbishops Vicar General, who then issues an *Inhibition* and *Monition*, and has the *transmiss* made to him in like form as in the case before mentioned.

If the appeal be from a grievance, and it be proved to the satisfaction of the Delegates, or admitted by the party appellate, the cause is retained above, and the Delegates go on to hear the whole merits (62).

The

(62) If the Respondent in the Appeal thinks that the grievance is real, Oughton advises him to avoid further expence by confessing the grievance and paying the costs incurred on its account, and then if he were Impugnant below to pray that the whole cause may be retained by the Delegates, and that the Appellant may proceed therein before them, but if he were the Promovent below he can *oblige* him to do so, because the Impugnant who appeals, cannot deny that he consents to the Judges above, and makes them Judges of his cause, Oughton, tit. 286.

As the appealing from a grievance is very often a trick for delay, it seems reasonable that either party should have a power, by confessing the grievance, to retain the cause above. In the title just mentioned, Oughton would seem to make a distinction between Promovent and Impugnant; giving greater privilege to the latter, yet in the next title, 287, he gives equal power to a Promovent when made Respondent in matrimonial causes, or suits for legacies, and lays down a principle

surely

The ca
tain term
this term
mus homin
time with
ty to proc
his senten
the law i
which is
under form
may run c

surely exte
lando, recusa
minus indiff
pellationis.

(63) If t
no, within
Judge's pow
erwards, or
be revoked a
If the Appe
ecute his fu
bove, prote
Court, to pro
and the caus

If the par
be Appellan
Appellant m

The cause must be prosecuted within a certain term, i. e. the appeal proceeded on, and this term is two fold, *Terminus Juris*, and *Terminus hominis*; the latter signifying the limit of time within which the Judge has bound the party to proceed on pain of his otherwise executing his sentence; the other the boundary assigned by the law in case none be assigned by the Judge, which is one year, called *primum fatale*, because under some special circumstances a second year may run called *secundum fatale* (63).

The

surely extending to both parties, viz. *Appellans, appellando, recusavit Judicem a quo, tanquam sibi suspectum, & minus indifferentem, et consentit pro parte in Judicem appellationis.*

(63) If the party serves an inhibition on the Judge *a quo*, within the time limited for retrocertifying, that Judge's power ceases, and attempts or *attentates* of his afterwards, or during the period given to retrocertify, will be revoked and declared invalid by the Judge of Appeal. If the Appellant, after inhibition served, neglects to prosecute his suit, the Appellate may put a rule upon him above, protesting however against the jurisdiction of that Court, to proceed, otherwise to be dismissed with costs, and the cause remitted to the Court below.

If the party doth not chuse, or omits to do this, and the Appellant doth not proceed during one year, the Appellant may call upon him to shew cause, why the Appeal

The appeal proceeding, an Appellatory libel is exhibited, this is contested or answered by the opposite party, the depositions are read from the transcripts, in which all the proceedings below are made up in the form of a book; Advocates are heard, and the Delegates proceed to pronounce sentence, and according to their judgment decree *bene* or *male appellatum*, and in the latter case approving of the sentence of the Judge below, send back the whole cause to him with all its incidents, to be by him carried into execution; or they may, if they please, though he remits the cause, retain the taxation and enforcement of the costs (64).

Appeal should not be declared to be deserted, and the party appears, and attempts to shew cause, and offers to proceed, may if he can prove the desertion, stop him, and then the Judge declares the Appeal deserted, and remits the cause; but for some special reasons, when in the latter part of the year, the party has been diligent, and gives some plausible reasons for his delay in the former, a part or the whole of a second year is given to him.

(64) Appeals proceed in like manner from criminal causes, whether of the *mere office*, or *office promoted* by the Proctor of office; or whether *voluntarily promoted* by a person uninterested, or *ex instantia partis* by the party injured.

CRIMINAL CASES.

The proceedings in these are, as we have seen them to be in the Civil and Canon Laws, by *Inquisition or Inquiry, Accusation, and Denunciation*. In the first mode, in which the Bishop or his Official proceeds from the *mere office*, (60) induced by public fame or the relation of creditable persons to inquire into the innocence or criminality of Persons within his jurisdiction, the party appearing has articles exhibited to him, which (says Oughton) he is bound to answer upon oath, *not to criminate himself* but so far as relates to the fame and the Judges jurisdiction; and as if he refuses to appear he may be excommunicated, so if he refuses to answer after being thrice admonished, he is to be pronounced contumacious and the articles taken for confessed, and then Oughton goes on to say that if he does confess the fame he is obliged to answer to criminous

(60) But though he may exhibit articles from the *mere office*, he generally appoints one of the Proctors to be the Proctor or Promoter of office, and appeals in causes of correction consider that Proctor as the Promovent, and not the Judge.

positions, that is, he is obliged to criminate himself (61).

If he denies the same, or admits it but denies the fact, witnesses are to be examined and proofs produced as in other ordinary causes, and the proceedings in all such causes of correction *ex mero officio* are *summary*; and if the Impugnant doth not appear, the witnesses being examined and their sayings published, definitive sentence may be passed in his absence, he hav-

(61) How to reconcile these contradictions I confess I do not know, especially as the note refers us to the English statute 13 Ch. II. c. 12. and in the case of Goulson and Wainwright, 1 Sid. 374. it was determined that if articles *ex officio* are exhibited in the Spiritual Court for matters criminal, the party may plead that he is not bound to answer, and may have a prohibition; but in a mere civil suit he is bound to put in a personal answer. No act similar to the above-mentioned statute of Charles has passed in Ireland; I have made a query at the end of the first Volume, whether it be not virtually abolished in Ireland, but at the last visitation in the College of Dublin it was asserted that it remained in full force. If so, surely some law ought to be introduced to abolish it, and put us on a footing with our sister kingdom.

The act of 6 Geo. I. in Ireland ch. 6. ordains that no citation *ex mero officio* shall issue unless the crime charged to have been committed within two years before. This act speaks of the oath of purgation as still in force.

ing first been cited *de novo* to hear such sentence. If the Impugnant appears he may except against the adversaries witnesses, and reprobate their sayings, and before publication propose any defensive matter in his favor.

The witnesses must shew the grounds of suspicion, and with whom and upon what foundation the same rested, which if it appears to have arisen from folly or malignity, it is frivolous and false rumor and not public fame; and the Impugnant, says Oughton, is not bound to answer such criminous positions, nor to accuse himself of them. If the crime be proved, the Judge proceeds to conclusion as in other *Summary* causes, and passes a definitive sentence according to the nature of the crime, with costs against the criminal person, and though it be not proved, if vehement presumptions and circumstances of great suspicion offer themselves, Canonical purgation, says Oughton, may be required from the party, in which if he fails, public penance is to be imposed on him.

Accusations or Suits from the *office voluntarily promoted* are *Plenary*; they admit of replications, duplications, &c. but the Accuser is liable to ample costs if he accuses without reason.

Denunciations or *Presentments* by Church-wardens and Sidesmen are so entirely out of use,

use, from the danger to which such presenters were liable from the just actions that might be brought against them, and in Ireland by the special provisions of the Act 6 Geo. I. chap. 6. that they need here only be mentioned (62).

The High Commission Court, though reprobated by the Irish Parliament of 1640, and declared null, never was abolished by any express Act of Parliament in Ireland, as it was in England by the Act 16 Char. I. (63).

(62) This act provides that *voluntary Promoters and Presenters* of offences shall be examined on oath before the citation issues, and the examination reduced to writing, and the Promoter failing in proof condemned in double costs, but this not to hinder Ordinary from proceeding against Ecclesiastical Persons subject to their visitation in the usual way.

(63) Another instance of inattention to real liberty in that country too noted for licentiousness. A Commission issued in 1693 commonly called the Lisburn Commission to three Bishops to visit the diocese of Down, whose Bishop (Hacket) and Clergy were accused of enormities.

They deprived an Archdeacon Matthew. He appealed or applied to the Chancellor (*Cox*) for a Commission of Delegates, insisting that this was not like the high Commission Court, that it was an Ecclesiastical Commission, founded on the King's prerogative and the Common Law, and such a one as might exist in England notwithstanding stat. 16 Car. I. and that an appeal lay from it, though none did from the high Commission Court. That it was the King's visitation operating upon a diocese, like the Archbishop's inhibition in his triennial visitation, suspending the Bishop's authority for the time being, but substituting another *Ordinary* authority in its place. That the Bishop's power of visitation is only that emanation of the King's prerogative which may be granted to any body else. How else could an Archbishop be deprived.

Chapter the Fifth.

ON THE PRACTICE OF THE COURT
OF ADMIRALTY.

THE way is now smoothed to an acquaintance with the practice of the Court of Admiralty, which closely pursues that of the Civil Law; and as to pleadings, depositions and examination of witnesses, demand of personal answers, conduct of appeals from definitive sentence, and many other points, so entirely agrees with that of the Ecclesiastical Courts, that Clarke in his *Praxis Admiralitatis* contents himself as to these heads with merely referring to his other practice of the Ecclesiastical Courts. The labour therefore of the Student is now become much more compendious, and his path more clear and easy.

But

But before I proceed to the practice of this Court, it will be useful and necessary to premise some account of its jurisdiction, which will be best illustrated by a short historical narrative of the principal questions which have arisen thereon.

The jurisdiction of the Admiralty considered as a *Civil Court*, has principally (1) for its subject matter, contracts made *super altum mare*; or even though not strictly upon the sea, if entered into for *marine* or *maritime* causes (2) affecting a *ship* or *her cargo*: considered in this light

(1) I have said principally because it is said to have a power of arresting or pressing ships for the King's voyages—of punishing neglect of duty in not requiring the salute of the flag, or in surrendering a ship without fighting, &c. &c. but modern laws and customs have rendered many of these powers obsolete or forgotten, since articles of war were known, and the Lord High Admiral's power vested in Commissioners.

(2) As for instance, in case of mariners' wages. Once it was held that it must be *on the sea*. Good sense afterwards determined that the nature of the question, and not mere locality must determine the jurisdiction. When actually made upon the sea, it must also be for a *marine* cause. Thus the Master of a ship's own private obligations for his own debt, though made at sea, would not give the Admiralty jurisdiction. *Bridgeman's case*, Hob.

the Court of Admiralty is called the *Instance* Court, and this Court is from time immemorial.

There is another jurisdiction in matters of prize (whether coeval with the Instance Court, or, which says Lord Mansfield is more probable, of a later date) quite distinct from the former, though exercised by the same person. To constitute this authority or to call it forth (3), a Commission

(3) These are the words of Lord Mansfield, in *Le Caux and Eden*, Douglas 614. Whether this authority be by a Prize Commission *constituted* or only *called forth* is a remarkable question which has lately offered itself with respect to the Admiralty of Ireland, the Judge of which had a Prize Commission while it was a Vice Admiralty Court with appeals to England; but from 1784, when it became an independent high Court of Admiralty, has had none. It is insisted on behalf of that Court, that the Prize Jurisdiction is inherent in it, though the Crown may chuse whether it will call it forth or not; but that it is so far inherent in it, as to exclude the possibility of the English Court of Admiralty acting in the kingdom of Ireland: i. e. that the Irish Court must either be empowered to exercise a Prize Jurisdiction, or there can be none such in that kingdom.

The arguments for the Irish Court of Admiralty went further. That Court having in the beginning of the present

a Commission under the Great Seal issues, (for the General Commission given to the Judge of the Admiralty, which enables and authorises him to sit in the *Instance* Court says not a word of *prize*) to the Lord High Admiral to will and require the Court of Admiralty, and the

present Spanish war seized several Spanish vessels in the ports of Ireland, and also the cargo of a Grecian ship from Patras to Amsterdam alledged to belong to the enemy, as Droits of Admiralty, the English Admiralty took offence and denied that the Irish Court had any such power, not having a Prize Commission: that the doctrine of Droits claimable under the common Commission related only to Civil Droits, such as Flotams, Jetfams, and Ligams, E. G. where a ship is found floating at sea, without any living creature on board, but not to what may be called Prize Droits, i. e. the goods of the King's enemies surprised or taken without Commission, or accidentally falling into the hands of the King's subjects.

On the part of the Irish Court of Admiralty a very able paper was published, but as these questions are still in agitation, delicacy prevents me from descanting further on this curious subject than to say, that the Irish Court did not so much insist, if at all, that it had a power to condemn as prize without a Prize Commission, as that the English Court had no such power; or even if it had, that the ship when condemned must still revert to Ireland as a Droit.

Lieutenant

Lieutenant
gate, or
rised and
manner
prisals, o
be taken
ing to th
of nation

As a C
takes co
the high

I shall
stant abo
ing Mar
the mos
in whic
instance
Courts

Since t
Court of
of the G
opinion t
without
ancient t
could loo
III.: and
a power

VOL.

Lieutenant and Judge of the Court, his Surrogate, or Surrogates, and they are thereby authorised and required to proceed upon all and all manner of captures, seizures, prizes, and reprisals, of all ships and goods that are or shall be taken; and to hear and determine, according to the course of the Admiralty and the law of nations.

As a Criminal Court, the Court of Admiralty takes cognizance of offences committed upon the high seas.

I shall speak first of the *Instance* Court Conversant about Civil Causes. This Court in enforcing Marine Contracts acts principally, and for the most part originally, *in rem* upon the ship: in which respect it gives a remedy *in the first* instance by warrant to arrest the ship which the Courts of Law could not do; but it may also

Since the former part of this note was written, the Court of Chancery has granted a prohibition in the case of the Grecian ship above-mentioned, being decidedly of opinion that the Irish Admiralty could not entertain it without a Prize Commission, that there never was in ancient times an Admiral of Ireland, and that Court could look for its powers only in the Statute 23 Geo. III.: and that by any other construction, it would have a power of determining peace or war.

upon occasion enforce a Marine Contract by acting (4) *in personam*; thus suits are sometimes there brought against the Master or Owners jointly with the ship, sometimes against them solely, which power may be very necessary, as suppose in a suit for Mariners Wages the ship has ceased to exist, or cannot be found, whereby they cannot have a remedy against her.

Notwithstanding

(4) Thus in 2 Shower p. 86. we find an instance of proceeding against the person, and in the same book p. 338, a libel against a ship, her Master, her late Owner and her present Owner: a prohibition issued as to the ship and her present Owner, but not as to the rest. See also *Alleson v. Marsh*, 2 Ventris 181. 2 Siderfin 161. Viner's Ab. Court of Admiralty E. 3. Scallan's case in the Appendix to this Work. A warrant against the person is found in every Admiralty Office, and Blackstone says the first process is frequently against the person, though Godbolt p. 260. observes that the first process is against the ship and goods, and Sir L. Jenkyns Vol. I. p. 82. says there can be no other process on the water. Clarke's Admiralty Praxis begins with process against the person and it takes up more than half the book, yet as I have said in the text above, I apprehend no instance can be found in the books of proceedings against the person without his express consent, except through the medium of the ship—I mean unless the value or proceeds

Notwithstanding however all that is said of proceedings in the Admiralty against the person, and that more than half of Clarke's Praxis Admiralitatis relates to such proceedings, it appears to me that the Admiralty has not jurisdiction to hold plea of mere personal contracts; thus for instance the Master of a ship cannot sue for his wages in the Admiralty, because he contracts only on the personal credit of the owners, and has no lien upon the ship; in hypothecations the thing cannot happen, for they expressly bind the ship, but in charter parties you can only proceed against the ship, not for the penalty; and therefore I have added above

F f 2

in

of the freight, ship, or cargo, had somehow mediately or immediately come into the hands of that person. I think all the cases above cited if well examined will be found to come within this description: I will refer the reader also to what is said in *Smart v. Wolf* 3 Term Rep. p. 338 and 339. where it is held that if the Court has not possession of the thing itself, they can have no jurisdiction unless they get it by the consent of the party, and his entering into a *stipulation*, see 1 Keble 500. and it is there said many prohibitions have gone as to proceedings against *Owners*, where both Owners and ship have been libelled in the Admiralty, and where the Owners had not bound themselves by

F f 2

stipulation,

in defining the Admiralty jurisdiction in the Instance Court, the words *affecting a ship, her freight, or cargo*, and it seems to me that great part of the disputes in the last century between the Courts of Common Law and Court of Admiralty, arose from neglecting this material point.

The Court of Admiralty considered nothing *but relation to the Sea*, and therefore endeavoured to *include* all contracts having reference to it, although merely personal. The Courts of Common Law considered only *locality* and therefore attempted to exclude all contracts made

stipulation, Johnson *v.* Shippen, 2 Lord Raymond 984. Bricket *v.* Pearce 6. Vin. 523. pl. 22. Yates *v.* Hall 1 Term Rep. 79. and this very case of Smart *v.* Wolfe was determined on the ground of the *produce* remaining in Defendant's hands to answer the *freight*. In Watson *v.* Warner 2 Siderfin 161. Twissden Justice, says the proper proceeding in the Admiralty is against the ship. Newdigate Justice, indeed says, against the person also as has been *lately* agreed, but the case was of a ship attached for breach of a Charter-party. Judge Buller directly confirms my opinion, 3 Term Rep. p. 270, where he says, if a party bind himself to answer *personally* to another, the Admiralty cannot take cognizance of the question.

upon

upon t
rem, up
The
of its v
of Com
position
have fa
perplex
when o
they ma
in the
on the f
general
but said
tice Hol
Error fac
(6) any
statute t
dictory c
work don
that cont
fecting t
which lai
even so
(5) It m
made on se
—or a mar
ing no lien
Admiralty
(6) Rep
kins *v.* Ca

upon the land, though producing a direct lien *in rem*, upon the ship, and for a maritime cause (5).

The Court of Admiralty has been beaten out of its vague and too general claim. The Courts of Common Law have not totally deserted their positions, and thereby in my humble opinion have fallen into the greatest contradictions and perplexities to reconcile their doctrines. Thus when obliged to concede that seamen, though they made their contract upon land, could sue in the Admiralty because they had a *specific lien* on the ship, they would not allow this to be a general criterion of the Admiralty jurisdiction, but said, it was an indulgence or (as Chief Justice Holt expressly says) that in this case *Communis Error facit Jus*, as if says the learned Mr. Douglas (6) any usage or common error could abrogate a statute to any purpose. Hence all the contradictory decisions as to shipwrights, and suing for work done on a river, and the old determinations that contracts executed abroad upon land tho' affecting the ship were not suable in the Admiralty, which last opinion was attempted to be supported, even so late as in the case of Menetone and

(5) It must do both. A mortgage of the ship, though made on sea, if not for considerations relating to the sea, —or a maritime service, as that of the Captain's, producing no lien on the ship, would neither of them give the Admiralty jurisdiction.

(6) Reports. note to page 102. in the case of *Wilkins v. Carmichael*.

*

Gibbons,

Gibbons, 3 Term Rep. p. 267 (7). But all these matters will be best illustrated by a short historical detail.

The Admiral, and Court of Admiralty are said to have been time out of mind, (8) though not by that name, for in the reign of Henry III. he was called *Capitaneus Maris*, in the reign of Edward I. the name of Admiral was introduced, and in the reign of Edward I. and Edward II. there were three such Officers, one at Yarmouth, another at Portsmouth, and the third on the Western or Irish Coast. The first Admiral of all England according to Spelman, was Richard Fitz Allan in the reign of Richard II.; (9) his authority depended upon his commission, and he was constituted sometimes for life, sometimes during pleasure (10).

(7) It was there however determined, that whether the Admiralty has jurisdiction must depend upon the *subject matter*, and that it had cognizance of an hypothecation bond given in the course of a voyage, though executed *on land and under seal*.

(8) Co. Lit. 260. Reeves says however there was no such officer till the reign of Edw. I. Vol. III. p. 197. he must mean, not known by that name.

(9) Spelman's Gloss. derives the name of Admiral from the Arabian word *Amir* Præfectus and the Greek *αλμυρης* *Almyris* Marinus, other from *αλμυρης* *Almyris* saltfugo.

(10) 4 Inst. 148. Rymer's *Fœdera* furnish a great store of knowledge to the curious on this subject.

We find nothing concerning his Judicial Authority until the reign of Richard II. when a similar jealousy sprung up with respect to his court, as had done with respect to the Courts of the Constable and the Marshall; particularly in the port towns, which had franchises of their own. This produced the two remarkable acts one made in the thirteenth, the other in the fifteenth years of that Kings reign; the first declared, that the Admiral or his deputies should not meddle with any thing done within the realm, but only with things done upon the sea, as had been used in the time of Edward III. The second, that of all manner of contracts, pleas, and quarrells, and all other things arising within the bodies of Counties, as well by land as by water, and also of wreck of the sea, the Admirals Court should have no cognizance; nevertheless it might of the death of a man and of mayhem done in great ships, being and hovering in the main stream of great rivers, and below the bridges of the same rivers near the sea (10).

During all the period from the reign of Richard II. to that of Queen Elizabeth, though we find a few scattered cases, (which are collected

(10) *Infra primos pontes.*

by

by my Lord Coke in the 4th. Institute cap. 22 when treating of the Court of Admiralty) in which prohibitions were granted against Admiralty proceedings alledged to have exceeded jurisdiction, there is no such determined contest between this Court and those of Common Law as can claim the readers attention; (11) but in the year 1575 it appears that their diffension had arisen to such a height, as to call loudly for a settlement, and that accordingly an agreement (12) was made in the said year between the Judges of the Kings Bench and the Court of Admiralty, for the more quiet and certain execution

(11) There is however one memorable Statute which must not escape his notice, viz. 2. H. 4. chap. 11. giving an action with double damages against him that improperly sues in the Admiralty.

(12) So Dr. Dun Judge of the Admiralty asserted in the Articuli Admiralitatis presented to the King in the 8th year of Jac. 1. and I think no one will doubt the fact, who reads the learned *Zouch's* arguments: yet my Lord Coke, though he admits such a paper was read to the King, objects that it was not signed by the Judges and denies it to be law;—and says the *phrase* thereof do not agree with the terms of the laws of this realm, 4th Institute p. 136.

of the A
heads of
go after
terms el
Court of
Parties th
habeas co
be for ca
or if it b
such caus
This a
the jealou
alleged
they were
on his rea
suppose t
the Adm
came a C
vice Bulle
have ente
community aga
for in Fel
in 1609,
(13) See
dition.

(14) 3 T
truth my L
with the Ci
VOL. II

of the Admirals Jurisdiction. The principal heads of which were that no prohibition should go after sentence in the Delegates, nor after two terms elapsed from sentence below—that the Court of Admiralty might hold plea of Charter Parties though made within the realm—that no habeas corpus be allowed if the imprisonment be for causes within the Admirals' jurisdiction, nor if it be for contempts of that court in any such causes (13).

This agreement had not the desired effect—the jealousy of the Courts of Law continually alleged encroachments in the Admiral, while they were in reality continually encroaching upon his real and undoubted jurisdiction. We may suppose that these unjustifiable controuls upon the Admiralty encreased after Lord Coke became a Chief Justice in 1605, (who as Mr. Justice Buller has truly remarked, (14) seems to have entertained not only a *jealousy* of, but an *animosity* against, the jurisdiction of the Admiralty), for in February the 8th of King James I. that is in 1609, the Admiral found himself obliged to

(13) See it set forth in Zouch on the Admiralty Jurisdiction.

(14) 3 Term Reports p. 348. in *Smart v. Wolf*. In truth my Lord Coke could not bear any thing connected with the Civil Law.

prefer a petition, or articles of complaint to the King, for which and the answers thereto by the Judges, I must on account of their length, refer the reader to Lord Coke's 4th Institute, p. 134.

From this period till the year 1632, numerous cases in Croke's and other Reports of that period shew how unsettled were the ideas of men as to the jurisdiction of this Court, and how numerous the encroachments on it, as well as the complaints against it: but in the last mentioned year all the Privy Council of England came to resolutions, which were also subscribed by all the Judges, much more definite and favourable to this Court, than had before been assented to, as may be seen in the note (15).

This

(15) These resolutions are:

1. If suit should be commenced in the Court of Admiralty upon contracts made, or other things personal done beyond the seas, or upon the sea; no prohibition to be awarded.

2. If suit be before the Admiral for freight, or mariners wages, or for breach of Charter parties, for voyages to be made beyond the seas: Though the Charter party happen to be made with the realm; so as the penalty be not demanded, a prohibition is not to be granted. But if the suit be for the penalty; or if the question be, whether the Charter party were made or not; or whether the Plaintiff did release or otherwise discharge

charge

This act of Council is inserted in the early editions of Croke's Reports, but left out in the latter seemingly *ex industria*, and altogether affected to be treated lightly by the common Lawyers in the last century, like the settlement in 1575; yet it has by degrees come to be considered the same within the realm; this is to be tried in the King's Courts at Westminster, and not in his Court of Admiralty.

3. If suit be in the Court of Admiralty for building, amending, saving, or necessary victualing of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party; no prohibition is to be granted, though this be done within the realm.

4. Although of some causes arising upon the Thames beneath the first bridge, and divers other rivers beneath the first bridge, the King's Courts have cognizance; yet the Admiralty has jurisdiction there, in the point specially mentioned in the statute of 15 R. II. And also by exposition of equity thereof, he may inquire of and redress all annoyances and obstructions in these rivers, that are any impediment to navigation or passage to or from the sea: And also to try personal contracts or injuries done there which concern navigation upon sea. And no prohibition is to be granted in such cases.

5. If any be imprisoned, and upon *habeas corpus* brought if it be certified that any of these be the cause of his imprisonment, the party shall be remanded.

dered as it were the great charter of the Admiralty and declaratory of its rights, and Sir Leoline Jenkins observes that it was the result of many solemn debates and not the effect of artifice or surprize, and he observes that the Usurpers after the death of King Charles I. though they abolished the office of Lord High Admiral, made ordinances similar to the above resolutions of the Council, and that at the Restoration the Merchants petitioned for a re-establishment of rules according to those of 1632.

Notwithstanding the petition of the Merchants we find the jurisdiction of the Admiralty almost as much controverted and unsettled after the restoration as before.

The Rump Parliament had made an act to enable Mariners to sue for wages in the Admiralty, yet we find that power expressly denied immediately after the restoration (16), and disputed down to the time of King William, on suggestions that the contract was made upon land.

(16) The first case in which it was decided, that Mariners might sue in the Admiralty, is in *Winch. p. 8.* See 1 Lord Raymond 576. See the cases of *Alleston* and *Marsh*, 2 Ventris 181. *Coke v. Cretchet*. 3 Levynz. 60, and

By

By the
super alt
that the
made be
labour c
necessari
After ma
first posit
netone a
60, and an
allowed a
Clay v. S
though al
mond 104
join in th
Law, and
men's wag
in the Adm
The M
ter, nor
wards bec
for his w
Raymond
Master
rines wag
2 Lord Ra
Master
p. 511. or
be cannot

By the same strict construction of the words *super altum mare*, the Courts of Law denied that the Admiral had jurisdiction of contracts made beyond sea, or of claims for work and labour done in port on account of a ship, or necessaries sold for her use before she sailed. After many struggles it appears to me that their first position was deemed too general, for in *Mennetone* and *Gibbons* before mentioned, 3 Term

60, and an anonymous case, 1 Ventris 343. It was clearly allowed and admitted in King William's reign.—See *Clay v. Snelgrove*, 12 Mod. p. 405. Seamen may sue though all the work is done in the river, 2 Lord Raymond 1044. because the ship is liable, and they may all join in the suit, neither of which may be at Common Law, and yet much for the ease of poor seamen. Seamen's wages, if due by *deed* or *special agreement* not suable in the Admiralty, *Opy v. Child*, 1 Salk. 31.

The Mate may sue for his wages, but not the Master, nor the Master's Executors; Mate, who afterwards becomes Master, can sue in the Admiralty only for his wages as Mate. See *Strange* 937. and 2 Lord Raymond 577. and 1 Salk. 33.

Master of a ship may reimburse himself out of Mariners wages for a loss happening by their negligence, 2 Lord Raymond 650.

Master may detain the ship for his freight, 12 Mod. p. 511. or the goods, but if he once parts with them he cannot retake them.

Rep.

Rep. p. 267. it was admitted that if the subject matter of the contract was within their jurisdiction, such as the hypothecation of a ship, it continues so though made on land abroad, for it would be absurd, says Lord Kenyon, that the parties must go upon the sea to execute the instrument.---Their second and third positions are true, as appears from the decisions in *Justin and Ballam*, 2 Lord Raymond 805, and in *Ross v. Walker*, 2 Wilson p. 264 (17), and it is settled that the Master cannot hypothecate the ship before the voyage begins in *Lister v. Baxter*, Strange, 695, but he may hypothecate both ship and goods on the voyage, 1 Salk, 34.

The next great matter of contest was with respect to *stipulations*. Lord Coke, 4 Institute 135, had declared his opinion that they could not be taken, and the Common Lawyers perpetually confounded them with recognizances, and even after the Revolution a Prohibition was granted against proceeding on such a stipulation, (18) and it was not until the middle of the reign of Queen Anne (19) that a restriction so totally destructive of the very existence of

(17) And also in *Watkinson v. Bamardiston*, 2 P. W. 367. and *Wilkins v. Carmichael*, Douglas 97.

(18) *Knight v. Perry*, Comberbach 109.

(19) *Degrave v. Hedges*, 2 Lord Raymond 128 5.

the Court, was totally given up by the Courts of Law.

In the mean time the celebrated Treatises of Zouch and Godolphin, and the clear good sense of Sir Leoline Jenkins (20) (who was Judge of the Admiralty as well as the Prerogative Court in the

(20) Sir L. Jenkins having been much in confidence with the Stuart family, was decried, or at least slightly spoken of by Burnet and others after the revolution: he was however a considerable man, and many of his schemes and designs if they had been carried into execution, would in my humble opinion, have been very salutary to the state, particularly that for establishing a standing and permanent Court of Delegates. His authority in matters of the Admiralty is deservedly high, and every student should peruse his celebrated argument before the House of Lords in the reign of Charles II. on a bill to ascertain the jurisdiction of the Admiralty. In this he ably points out the inconveniences to the public and to the trade, if that jurisdiction be evaded. 1. As to foreign contracts or those made abroad *; 2d. As to Mariners wages, freight and charter-party; 3d. As to building and victualing of ships, and as to material men, i. e. who furnish materials or supply work for the ship; 4th. As to disputes between part owners.

* Suppose, says he, an Englishman bound to a Spaniard by a contract made in Spain. The Spaniard sues here, Defendant pleads non est factum, the Court of Law cannot issue a Commission to Spain.

Some

the reign of Charles II). had gone a great way in illustrating these subjects and enlightening the minds of men upon them; yet the Student who reads, as he ought by all means to read carefully the cases under the head of Admiralty in Salkeld's, Strange's, and Lord Raymond's Reports, will perceive a fluctuation of opinion and uncertainty of Jurisdiction, down to the reign of King George II. since which time the few scattered cases in the succeeding reporters arising rather from doubts as to application of circumstances than want of fixedness of principle, shew that the limits of the Admiralty juris-

Some of the advantages of the Admiralty jurisdiction are also well summed up in *Le Caux v. Eden*, Douglas 600, where it is observed that if foreigners were obliged to sue at Common Law in such cases, they could very rarely remain in England with their witnesses the necessary time, whereas by the rules of the Admiralty cause can hardly last a month; but the great convenience is that all parties concerned may join in one libel whereas at law the costs alone of the numberless suits to which captors, (and I add creditors) on account of the ship would be exposed, independent of damages, would deter every man from suing; and how as Sir L. J. observes would a Captain or Owner get credit from what he calls material men, if they were obliged to pursue their persons, and did not rely upon the ship as their stake.

dictio

dictio a
think nea
cil in 16
Besides
tance Co
erty don
to a cargo
of persona

(21) Not
from Violet
y, 2 Term
ake place,
ot like co
ay entirely
le aspect.
In that c
ort, it is f
of the powe
d by the st
ow the bri
King's servic
Suppose I
is ship. If
county, p
e high sea
ip is, and
a action of
it; yet I h

(22) In L
Vol. II

diction are now pretty accurately settled, and I think nearly those laid down by the Privy Council in 1632.

Besides this cognizance of contracts the Instance Court holds plea of torts to marine property done upon the high seas, (21) as damage to a cargo, or injury to a ship; whether it may of personal torts seems doubtful (22).

Prize

(21) Not so if within the body of a county. Ruled from *Violet v. Blake*, Moor 891. to *Velthafon v. Ormsby*, 2 Term Rep. p. 315. Here *locality* seems strictly to take place, because *torts* must be entirely *local*, and cannot like contracts, (which though barely made on land, may entirely refer to the sea and the ship), have a double aspect.

In that case in Moor 892. which is and speaks of *torts*, it is said, the coasts shores and harbours are out of the power of the Admiral, save in two cases reserved by the statute 15 R. II. one of death or mayhem below the bridges, the other of seizing a ship for the King's service.

Suppose B. complains that A. has gotten possession of his ship. If the fact appear to be within the body of a county, plainly prohibition goes; but suppose it on the high seas, it is a mere question whose property the ship is, and seems to me more properly the subject of an action of trover or replevin, than of an Admiralty suit; yet I have known the latter brought.

(22) In *Le Caux v. Eden*, Douglas p. 594. the question

Prize Court. In case of prizes in time of war, between our own nation and another, or between two other nations, (23) which are taken at sea

tion was whether an action of Common Law could be maintained for an imprisonment on a capture at sea a prize, and it was determined that it could.

It was strongly urged for the action, that there was no remedy in the Court of Admiralty, and that no instance could be adduced where that Court had taken upon itself to assess damages for assaults, imprisonment or any injury done to the person, and indeed how could they without the intervention of a Jury.

On the other side it was insisted that though perhaps no direct case could be mentioned of damages assessed in the Admiralty *eo nomine* for personal injuries, yet that the standing interrogatories shew that in answering them any personal injury might be stated, and *querelles* upon the sea, 4 Inst. 134. seem to include personal trespasses and 1 Roll 250. and 3 Black. 106. were appealed to.

Mr. Justice Willes said he saw no reason why the Admiralty might not judge of injuries to *person*, as well as to *property*, and ascertain damages by reference to the Register who can call in assessors.

(23) These are the words of Mr. J. Blackstone; they seem to me to carry his opinion so far as to ships of other nations at war, brought into our ports, while we remain neutral.

It is said to be allowed by the law of nations to bring prizes

and brought into our ports, the Courts of Admiralty have an undisturbed and exclusive jurisdiction to determine the same, according to the course of the Admiralty, and the Law of Nations (24).

prizes into neutral ports to sell them. Bynkershoeck, i. ch. 15. Vattell, book 3. ch. 7. sec. 132. and this opinion seems to be adopted by an able man, Dr. Kent, who is now Professor of Law in Columbia College in America, in some dissertations by him published.

On the other hand, Sir L. Jenkyns in his letters, and the celebrated Answer to the Prussian Manifesto, 1753, appear to hold the contrary, at least as to any power of condemnation in the Admiralty Courts of the neutral nation.

An extraordinary practice has prevailed, of the Consuls of Belligerent powers holding courts, and condemning ships in neutral ports. England and France have done so by their Consuls in Norway, and France has done so in the present war also in America. It is said that the eminent Judge who now presides in the Admiralty of England, and also the Court of King's Bench there, have very lately decided against the validity of such adjudications; but of this I can speak only from report.

(24) The *Instance* Court is governed by the Civil Law, the laws of Oleron, and the customs of the Admiralty, modified by statute law.

The *Prize* Court, is to hear and determine according to the course of the Admiralty, and the law of nations.

When the prize jurisdiction originated, is a question buried in obscurity ; whether says Lord Mansfield, it was coeval with the Court of Admiralty, or which is much more probable of a later date, though beyond the time of memory but this is certain, saith the same learned Judge that the most ancient instruments shew a prize jurisdiction, either *inherent*, or by *commission*, in the Admiralty, which has solely exercised the jurisdiction of prize.

The end of a Prize Court, continues the same great Judge, is to suspend the property 'till condemnation, to punish every misbehaviour in the captors, to restore instantly *velis Levatis* if upon the most summary examination there do not appear sufficient ground, to condemn finally if the goods really are prize, against every body giving every body a fair opportunity of being heard. The manner of proceeding is totally distinct from that in the Instance Court—the whole system of litigation and jurisprudence is peculiar to itself—it is no more like to the Court of Admiralty, than it is to any Court in Westminster Hall. The appeal from it lies not to delegates but to Commissioners consisting of Privy Counsellors. But I should do great injustice to the elaborate argument from whence I have taken these

these quor
the reader
The co
mitted to
matters of
locality bu
governor
common
Henry IV.

(25) In I
note to Le
determined
stance of
ty captur
Admirali
(26) So fa
enstone an
nce Court
contracts
tracts ma
cluded, as
Admiralt
de upon th
(27) In L
P. p. 386
a prohibiti

these quotations, if I went further than to refer the reader to it (25).

The common jurisdiction of the Admiralty is limited to things done *super altum mare*, but in matters of prize, the jurisdiction depends not on locality but on the subject matter, (26) which is governed by the *Jus belli*, and not by the common Law. The statutes of Richard II. and Henry IV. do not apply to the Prize Court (27).

On

(25) In *Lindo v. Rodney* given by Mr. Douglas in note to *Le Caux and Eden*, Rep. p. 613: it was there determined that when a *capture* is made on *land* by the assistance of a fleet, all questions concerning the property captured belong exclusively to the jurisdiction of the Admiralty Court.

(26) So said L. Ch. Lee, see Douglas, 608. But in *Metone and Gibbons* the same is ruled as to the Instance Court, and with humble deference let me ask if contracts made on land to be executed on sea, and all contracts made at sea to be executed upon the land are included, as Mr. J. Blackstone says they are, what will the Admiralty have to try; for how few contracts are made upon the ocean, to be there also executed.

(27) In *Lord Camden v. Home* in error, 4 Term Rep. p. 386, it is said by council, there is no instance of a prohibition to a court of prize; but that is contradicted

*

On the extent then of the prize jurisdiction there can be no doubt ; the sphere of its consideration is wide indeed, no less than the Law of Nations, and therefore we are not to wonder that some grand and momentous general questions seem still undecided therein (28).

dicted on the other side, and 2 Leo. p. 182. appealed to. In that case it was determined that the Prize Courts and Lords Commissioners of Appeals have the *sole and exclusive* jurisdiction over the question of prize or no prize, notwithstanding any of the prize acts.

(28) Take two remarkable examples. One to what extent the goods on board neutral ships trading with the enemy are contraband and seizable. The other, when is a capture complete so as to transfer the property to an enemy.

As to the first, I find I have in the former volume expressed myself ambiguously *, so that I might be supposed to mean that the powers leagued in the armed neutrality 1782, asserted a right to carry military stores to the enemy. I did not. By the *materials* of war in that passage I meant enemies property in general, carried in neutral bottoms, so as to enrich the enemy, and furnish the sinews of war : And that free ships made free goods except as to naval and military stores, they did assert.

As to the second question I may have been understood to mean † that less than twenty-four hours possession

* Introductory Lectures, p. 65.

† Note to Lec. 7. p. 203. Vol. I.

The English Statute 2 W. and M. enacted that the office of Lord High Admiral might be executed by Commissioners, and in fact it has always been so since the accession of the present family.

Criminal

or even half an hours occupancy makes a firm capture by our law. No such thing! If any fixed rule, absolute condemnation seems necessary, but in truth the rule seems still uncertain. In *Goss and Withers*, 2 Burr. 680. after Lord Mansfield has observed that some writers had held, that "*quæ ab hostibus capiuntur, statim capientium fiunt*;" that others said from the Roman Law that the prize must be brought *infra prasidia*—that Grotius and many more had made twenty-four hours quiet possession the criterion, and that the English Court of Admiralty has held that no property vests till sentence of condemnation as good and lawful prize *, he proceeds to say in a tone of *uncertainty*,—but *whatever rule ought to be followed against a recaptor or vendee*, it cannot affect a case between insurer and insured.

Let me be allowed to notice two other important questions which have of late occurred. 1st. How far neutral succours can be employed with respect to Belligerent Powers. America in the present war has determined they could not, so far as to prevent an armed vessel of one Belligerent nation sailing, until 24-hours af-

* Said in *Lindo v. Rodney* to be still law, Douglas p. 617.

Criminal Court. This branch of Admiralty jurisdiction was formerly very important, and we find by the *Articuli Magistri Roughton*, (29) that it was the custom to make circuits, to summon Juries of 24 men to enquire into a vast variety of naval offences, and to punish even with death; but in later times, it seems to be almost done away, or at least so completely transformed in England by the statute 27 H. VIII. ch. 4. and 28 H. VIII. ch. 15. and in Ireland by the statute 11 Jac. I. ch. 2. that it is as it were fallen into oblivion.

These statutes enact that all treasons, felonies, robberies, piracies, murders, and conse-

ter an adversary. The 2d. Whether a neutral power can lawfully carry on a trade with one of the Belligerent parties, not permitted in the time of a previous peace. America has done this, in taking by treaty a share of our colony trade, with all the advantage of native ships, which she had not before this war; and this protects the commerce of a Belligerent Power under a neutral flag: whether this be agreeable to the law of nations has been warmly disputed, and the affirmative very ably supported.

(29) These articles which are affixed to the 5th and best edition of Clarke's Practice, contain much of the substance of the black book or *liber niger* of the Admiralty.

deracies

deracies
river, cr
or prete
ed, hear
and pla
Commis
mitted u
directed
to three
named b
summon
Before
must no
admiralty
Droits,
person o
seized in
war, by

(30) Se
III. ch. 7.
I. ch. 11.
is enacted
committing
virtue of
may be tr
Court of
provided,
high treas
VOL.

deracies committed upon the sea, or in any haven, river, creek, or place where the Admirals have or pretend to have jurisdiction, shall be inquired, heard, determined and judged, in such shires and places as shall be limited by the King's Commission, as if such offences had been committed upon the land; such Commission to be directed to the Admirals or their deputies, and to three or four other such persons as shall be named by the Lord Chancellor, with power to summon a Jury, &c. &c. (30).

Before we leave the subject of jurisdiction we must notice the *Droits* or perquisites of the Admiralty which may be distinguished into *civil* Droits, such as ships found at sea without any person on board, and *prize* Droits, such as ships seized in our ports, in the commencement of a war, by persons uncommissioned.

(30) See also in England the stat. 11 and 12 Wm. III. ch. 7. made perpetual by 6 Geo. I. ch. 19. 4 Geo. II. ch. 11. and 18 Geo. II. ch. 30. By this last statute it is enacted, that all natural born subjects or denizens committing hostilities against his Majesty's subjects, by virtue of any commission from his Majesty's enemies, may be tried as pirates, felons, and robbers, in the Court of Admiralty, on shipboard or upon the land, provided, that if they be not so tried they may be tried for high treason, according to 28 H. VIII.

VOL. II.

I i

Having

Having said thus much of Jurisdiction, (31)
I proceed to treat of the

P R A C T I C E.

Of the Instance Court—The first process in the Admiralty is against the ship: a warrant issues against the ship, whereof such an one is recited to be Master, upon an affidavit made of the cause of suit, directed to the Marshall of the Court,

(31) I must still say a word of Droits. Droits of the Admiralty were certainly Droits of the Crown originally. The Admiralty Jurisdiction is thought by some, particularly by Dr. Sullivan, to have commenced under Rich. I. when stayed at the Isle of Oleron. Whether these perquisites were then or afterwards expressly or impliedly granted to the Admiral himself, I will not determine; but they seem before the Revolution to have been, or some share or proportion of them at least, considered as his right*. Since the revolution, the value of them has been always paid into the Treasury, from whence, at the pleasure of the Crown, voluntary grants are frequently made to persons, by whose exertions they may have been acquired. It has been insisted that under the words of the Irish Act of 1783, the Court of Admiralty here stands in the same situation with that Court in England before the revolution in every particular. If there be any doubt whatsoever as to its boundaries under that Act, they should be accurately fixed.

* See Sir L. Jenkyns' Letter, and *Articulos M. Roughton*,

commissioning him to arrest the ship and cargo and to cite the Captain in special, and all persons in general, having or pretending to have an interest therein, to appear on a day named, to answer and defend in a certain civil and maritime suit there described. This warrant or a copy of it is usually affixed to the mast of the ship, which then becomes arrested by virtue thereof; this warrant being returned, with the Marshalls certificate of the execution thereof, a Proctor appears for the Promovent, and makes himself party for him, and proclamation is thrice made for the Master of the ship in special, and for all persons in general having or pretending to have an interest in said ship.

1st. Let us suppose that no one appears; they are expected if the Judge pleases till the next Court day, otherwise they are directly presumed to be in contempt, are pronounced contumacious, and in pain of their contumacy, the ship is, or rather they are, decreed to have incurred the first *default*, and the certificate of the execution of the warrant is continued to next Court day, default here meaning a non-appearance in Court on a day assigned; of these defaults there must be *four*, before the Judge can proceed, viz. on the next Court day the 2nd. default is incurred, on the third Court day the 3rd. default, and on the fourth

Court day the 4th. default ; (32) and then say the books, if the party still continues contumacious, and will not appear to defend himself or his ship, the Judge after four citations from the Admiralty, called *Quatuor Defalta* (for that called *unum pro omnibus*, is not sufficient to convince one of contumacy especially in the claim or vindication of a ship, any part thereof

(32) RULES OF COURT,

Where no appearance for the ship.

April 5th. Warrant which had issued against a ship returned, with the Marshall's certificate of its execution: a Proctor appeared for Promovent, and proclamation being thrice publicly made for all persons in general having or pretending to have any right title or interest in the said ship, but no person appearing, the Judge at petition of Promovent's Proctor pronounced them in contempt, and in pain of their contumacy decreed the first default to have incurred.

April 8th. Second default incurred.

April 11th. Third default incurred.

April 14th. The Judge assigned to hear the cause summarily this day, on which day the fourth default having incurred, proclamation having been thrice made for all persons, &c. &c. * and no person appearing, Promovent's Proctor in pain of their contumacy exhibited a summary petition, and having produced witnesses and

* As before.

proved

or any other such like thing or goods) may proceed to the *primum decretum*.

Of this first decree as known to the Civil and Canon Laws, I have given sufficient explanation before (33) but I have never met with it in practice, and on talking with the Proctors in this kingdom I do not find that they ever heard of the name (34). Clarks' directions however are, that on the four defaults being incurred, the Promovent's Proctor is to give in an allegation or summary petition which he calls the *Articulus ex primo decreto* stating his debt and the grounds of

proved the truth of the facts in the same, the Judge at his petition decreed a Commission of Appraisement and Sale, the produce over and above the principal demand and costs of Promovent to be paid over to the true Owner, saving the demand of A. B. Shipwright, who had *intervened* in the cause *pro interesse suo*.

April 22nd. Commission of Sale returned, with the Marshall's certificate thereon, the Judge was prayed to confirm the sentence, which he did accordingly.

(33) Page 22, 23, and 78 ante.

(34) It is evident on further considering the case in Moore 814. quoted in a note ante to p. 23. that the *first decree* mentioned in that case meant a possessory decree, a decree for the right of possession without determining the right of property, and not a seizure by way of sequestration, or *missio in bona*.

claim

claim, and praying to be put into possession which being proved by instruments and also supported by the Promovent's oath, a Commission of appraisement issues, and the costs being taxed and the Promovent giving security to appear and answer the claim of any person who shall claim right *within a year*, he is put into *possession* of the property till his debt be satisfied.

All this is exactly agreeable to the Civil Law (35) but in practice, after the four defaults incurred, the Promovent alledges and proves his case, and then I have always known the Court proceed *directly* to appraisement and sale, which when confirmed by the Judge, (36) is final but nothing is more frequent than for an Impugnant to come in after the four defaults incurred, and on paying all costs, to be permitted to defend.

If the goods are in a state of decay, or of a per-

(35) Vid. ante p. 23.

(36) Perhaps this confirmation was not intended to be till after a year, and means the *secundum decretum*, but in practice there is no stated time for it, and it is even in general here totally neglected.

Groenwegen *de legibus abrogatis*, which the favor of a friend has lately lent to me, expressly says that the *primum decretum* is totally out of use in modern days.

rishable

A
rishable na
the pendar
tence not
commission
to be lod
in *usum jus*
2dly. N
rested in th
tor; if upo
in Court
pugnant m
Judge fees
may be exp
of the Imp
with his co
ally or by h
by his Pro
given by hi
with costs,
next court
the same da

Whe
A. B. v. the
Sep. 3rd.
Impugnant.
fureties; and
rishable

irishable nature, it is usual for the Court during the pendency of the suit, or sometimes after sentence notwithstanding an appeal, to issue a commission of appraisement and sale, the money to be lodged with the Register of the Court, *in usum jus habentis*.

2dly. Now we will suppose that the party interested in the vessel appears, by himself or his Proctor; if upon his appearance the Promovent be not in Court ready to prosecute his suit, the Impugnant may be dismissed with costs, or if the Judge fees cause, the Promovent's appearance may be expected to some further day, under pain of the Impugnant's being then finally dismissed with his costs. If the Promovent appears personally or by his Proctor, the Impugnant must pray by his Proctor that a libel and sureties should be given by his adversary, otherwise to be dismissed with costs, which is decreed accordingly against next court day, and the Promovent to libel on the same day (37). There is no occasion in this case

(37) RULES OF COURT,

Where some person appears for the Ship.

A. B. v. the Friendship of London whereof C. D. is Master.

Sep. 3rd. Warrant returned. Proctor appeared for Impugnant. Prayed that Promovent should libel with sureties; and so decreed.

Sep.

case for the Impugnant to give sureties, because the ship is seized, and he or the ship is said to defend in custody, but if the suit be for the whole value of the ship it is reasonable that he should give security for the costs only; but if he wants to bail the ship, that it may be enabled to proceed on its voyage, then he is also to give security to the amount of the matter in question, as sworn to by the Promovent, and if either party makes it appear upon oath that he is unable to find sureties, he may at the discretion of the court be admitted to the fidejussory caution.

Sep. 18th. Sureties given by Promovent. Promovent filed a libel.

October 23rd. More witnesses produced. Commission of valuation returned and confirmed. Publication decreed unless cause.

Nov. 2nd. Promovent stayed publication, by praying to be restored to a term probatory upon an affidavit, for liberty to produce more witnesses: granted. And an attachment unless cause granted against a witness who disobeyed a citation to appear served on him by the Marshal.

Nov. 6th. The refractory witness appeared. The Impugnant exhibited a matter peremptory and defensive. Promovent to answer next court day.

Nov. 10. Promovent admitted the said matter peremptory as far as, &c. &c. and contested the rest negatively.

The Pro
the rule pu
cause proc
the Ecclesi
ters defens
assigned.

negatively. Pr
peremptory,
Sep. 21st.
far as by la
proved. Th
and decreed

Sep. 25th.

answer.

October 5

ed for his co

answer, unle

October 9

nant offered

of Valuation

valuation.

each party.

Two wit

allegation an

Nov. 20th

be restrained

ory. Court

perional answ

Vol. II.

The Promovent having libelled agreeably to the rule put upon him by the Impugnant, the cause proceeds exactly like a summary cause in the Ecclesiastical Courts. Exceptions or matters defensive are put in. Terms probatory are assigned. Witnesses are produced, or commissions

negatively. Promovent's personal answer to said matter peremptory, prayed and decreed.

Sep. 21st. The Court admitted Promovent's libel as far as by law admissible, and assigned the same to be proved. The personal answer of Impugnant was prayed and decreed.

Sep. 25th. Impugnant sworn to give in his personal answer.

October 5th. Rule, that Impugnant should be attached for his contempt in not having given in his personal answer, unless cause next court day.

October 9th. Personal answer given in; then Impugnant offered to bail the ship, and prayed a Commission of Valuation, that he might bail her pursuant to this valuation. Decreed and Commissioners named, two by each party.

Two witnesses produced same day to Promovent's allegation and also sworn to interrogatories.

Nov. 20th. Promovent prayed that Impugnant should be restrained to a time of proving his matter peremptory. Court limited him to a fortnight. Promovent's personal answer given in.

sions granted, if necessary to examine at a distance within the realm, or if the witnesses are out of it, they go *sub mutue vicissitudinis obtentu*.—These commissions are proceeded on.—The proceedings certified.—Publication prayed and decreed—and in short, every thing goes on to definitive sentence, exactly in the same manner as in a Summary Ecclesiastical Cause, with the few following exceptions.

The first is as to personal answers. If the party cited to give in a personal answer doth not obey that citation, a citation viis & modis issues and if he still continues contumacious, a citation goes against the bail or sureties to produce him, which if they do not do, nor appear to make excuse, proclamation being thrice made for them, they are declared contumacious, and a decree is made personally to apprehend them.

If the party appear, he is sworn to give in his personal answer before a day assigned, under a pecuniary penalty, and if he doth not do it

Dec. 12th. Publication unless cause next court day.

Dec. 17th. Publication passed.

Jan. 24th. Being the first day of the next term, the Judge assigned to proceed summarily, and to inform next court day.

Jan. 28th. Information and sentence.

is to be apprehended until he pays the fine (39), and undergoes his examination.

In the same manner if witnesses appear they are sworn under a penalty to undergo their examination, and if they do not appear a *compulsory* process issues to make them appear, or if they cannot be served personally, a decree *viis & moribus*, and if that be not obeyed, a *warrant for their personal apprehension*.

If commissions are granted to foreign parts for examination of witnesses, I do not find any difference between the practice of this Court and those Ecclesiastical, except that they are directed to Laymen such as the Magistrates of a town, not to Ecclesiastical Commissioners; nor in exhibiting and proving of instruments doth any material difference occur, save that as they must be often in this Court in foreign languages, Clarke more particularly describes the manner in which an interpreter is to be appointed, the translation entered in the Registry, and the original left in the hands of the Register.

As to publication, and the subsequent steps to conclusion and sentence, he particularly and totally refers to the Ecclesiastical practice.

Such are the proceedings against a ship, where

(39) So says Clarke, *sed quere*, the Court not being of record.

some person interested in her appears to defend and such as appears by the note below (40), (by rules in a case which I took from the Registry,) have they sometimes been even in the case of Seamen's wages, but in general Seamen's demands for wages are heard with particular favour and expedited with the utmost dispatch. They present a Summary Petition, which though generally in writing need not necessarily be so, the witnesses are heard *viva voce*, the parties may all join in the suit, and are admitted as witnesses for each other; so that if there be any fear of justice not being attained, it should rather seem to be on the side of the captors (41).

Causes *in rem* admit of another division which must not be passed unnoticed into *petitory* and

(40) POWER *v.* THE OLIVE BRANCH.

Summary petition. Peremptory matter put in to that. Witnesses produced to the summary petition and sworn to answer the Impugnant's interrogatories. Witnesses also examined to the peremptory matter, and sworn to answer the Promovent's interrogatories. The witnesses being examined and repeated, *publication* is decreed, and the Court orders the cause to be heard summarily.

(41) The last or 5th edition of Clarke's Praxis, in a note quotes and adopts Wellwood's saying generally that Seamen need not put in their petition *in writing*.

possessory

possessory (42), a distinction as has been observed familiar to the Civil and Canon Laws, and which indeed must be found in all codes,—suits for the thing itself or only its possession, claiming an absolute right or merely a *possessory* (43).

(42) Whether a cause be a *petitory* or *possessory* cause must be judged of from the conclusion of the libel: where a person's goods are seized, and he claims a *possessory* right in them, distinct from the right of property, he may institute a suit for the possession, (stating that he was in possession not by force, nor by fraud), and that he desires that possession to be restored to him in the first instance and before any further step be taken, which if decreed to him, the goods are to be valued, and he is to give security to the amount of their value in case he shall be afterwards defeated in a *petitory* suit depending on the right of property, to be brought by his antagonist.

The Plaintiff in the *possessory* cause, may also if his antagonist doth not proceed himself, and if the right of property was incidentally proved in the *possessory* cause, make use of those proofs in the *petitory*.

(43) The King of Spain *v.* Blage, Moor 814. is an instance of a *possessory* decree. The right to the ship itself not being yet determined, yet the possession was decreed to the Spanish Ambassador: it was in that case determined after some controversy that an *appeal* lay from such *possessory* decree.

I proceed

I proceed in the last place to suits against the *person* (44), and here a warrant goes in the name of the King (45) directed to the Marshall and his Deputy, empowering and charging him to arrest or cause to be arrested *the person*, and him so arrested to keep under safe and secure custody, so that he be forthcoming before the Court to answer in a maritime cause.

If the warrant is to be executed within twenty miles of the Capital, the Marshal himself is to execute it; if further, the party, acting as his Deputy. The warrant is to be shewn, and the cause of arrest told to the Impugnant, who will be then detained in custody, till he gives a sufficient fidejussory caution, which according to the course of the Court should be 500*l*. The warrant is then to be returned, with a proper certificate of its execution.

If the Impugnant doth not appear, he is pronounced contumacious, and a fresh warrant issues to take him, and the Judge may allot some part of the security to the Promovent to compensate his

(44) The query in what cases they can be in *personam* has been already discussed.

(45) Clarke says it should be in the name of the Lord High Admiral, directed to all Justices, &c. &c. and especially to the Marshal, and that the Register issues it of course, without the Judge's order.

costs,

costs, and
but if it
kingdom,
in the sec
the Prom

If the
rent abse

thrice call
pear, the
tence on t

court-day,
day at a c
not appea

with his
probable
day, it is

duce his o
When
sureties, (

appearance)

(46) This
practice. T
that the stip
security is giv

forfeited is f
(47) Clar
(48) Clar

costs, and if he fees meet may remit the rest (46); but if it appear that the Impugnant has fled the kingdom, and cannot be taken, the whole sum in the security or stipulation is to be adjudged to the Promovent (47):

If the Impugnant appears, and the Promovent absents himself, the latter is to be publicly thrice called (48), and then if he doth not appear, the Judge may at his discretion give sentence on the same day, or expect him to another court-day, or which is most usual, appoint a day at a competent distance, on which if he do not appear, the Impugnant shall be dismissed with his costs, and if the Impugnant thinks it probable that the Promovent will appear that day, it is advisable for him previously to introduce his own sureties.

When the party appears he is to give new sureties, (for the first were only bound for his appearance) unless on account of poverty he be ad-

(46) This extraordinary doctrine I never heard of in practice. The reason given in the notes on Clarke is, that the stipulation is Prætorian, i. e. the caution or security is given to the Admiral, not to the party, and if forfeited is forfeited to the former.

(47) Clarke, tit. 9.

(48) Clarke says oddly, by the *Marshall*.

mitted

mitted at the Judge's discretion to the jurator caution, (49) otherwise to remain in prison (50)

The subsequent stages in the proceedings in suits against the person *merely and directly*, do not appear to me to differ from those against the person where he comes in *collaterally*, (i. e. not to defend himself, but his ship, the original and direct action having been *in rem*) and therefore I think it unnecessary here to repeat them.

In all these suits when sentence is given against the defendant, a monition issues to him to pay the debt and costs within twenty, thirty, or forty days as the Judge may think fit, otherwise to be imprisoned till he doth; and if on the return of this monition it appears that he cannot be found, or is out of the kingdom, a monition goes against his bail or sureties to pay the debt and costs, and the Judge may at his discretion, and according to circumstances, issue a monition *viis & modis* against the principal before he goes against the bail, or on the

other

(49) This, observes the note on Clark, is contrary to Farinacius, who says the *fidejussor Judicio sisti* is bound for the parties' appearance at all times down to sentence.

(50) The Prison may be where the Admiralty chooses.

turn

other hand
that the
once proce
tion to the

Of the
on here for

(51) Clar

(52)

P

King's Pr
an affidavit a
monition ag
Next day
standing inte
Next day.
Marthal to v
Next day.
interrogatori
Next day.

J. Martin, v
to pay doub
condemned a
Next day.

sons exhibite

VOL. II.

other hand, if it appear previously to him that the principal is out of his reach, may at once proceed against the bail without any monition to the principal (51).

P R A C T I C E

Of the Prize Court (52). There is no occasion here for a warrant to arrest the ship. She is already

(51) Clarke, tit. 63, 64, 65.

(52) RULES IN A PRIZE CAUSE..

PILLANS v. THE VICTORIA.

King's Proctor first introduced the ship's papers, with an affidavit annexed, and the Judge decreed the usual monition against all persons in general, &c. &c.

Next day. King's Proctor produced witnesses on the standing interrogatories.

Next day. Upon affidavit a commission issued to the Marshal to unload and store the cargo of said ship.

Next day. More witnesses produced to the standing interrogatories.

Next day. D. F. Proctor, exhibited two claims for J. Martin, with affidavit annexed, and gave security to pay double costs in case the ship and goods should be condemned as lawful prize.

Next day. Three more claims for three others persons exhibited in like manner by D. F.

Vol. II.

I. 1

Next

already in custody, and the King's Proctor being apprised thereof, and the ships papers delivered to him, he appears in court for the King and introduces the ships papers, with an affidavit, and at his petition the Judge decrees the usual monition against all persons in general having or pretending to have an interest, &c. &c.

There are in this Court what are called *Standing Interrogatories*, to wit—regular printed Interrogatories appointed to be administered in all

Next day. A Commission of Valuation and Appraisement of the ship and goods claimed by Martin, decreed at his Proctor's petition.

Next day. King's Proctor returned the monition abovementioned, and the certificate of the execution of it was continued as to all persons not appearing, till next court-day, and King's Proctor, at Claimant's Proctor's petition, was assigned to alledge.

Allegations on both sides contested negatively. Witnesses examined to interrogatories. Depositions published. Exceptions to the Promovent's witnesses deposited. A term probatory on the exceptions. A corroborative matter, which was by the Impugnant contested negatively, and Promovent restrained to the term of law for proof thereof. 1st. Term probatory lapses to the corroborative matter. 2d. Term probatory lapses. Publication decreed. This was the 11th Dec. 13th Dec. a-day for hearing is appointed 18th. Cause begins to be heard. 25th. Sentence of condemnation passed.

prize

prize causes to the King's witnesses, extremely particular and comprehensive; to these the said witnesses are examined, and if no one appears to dispute the King's claim, upon their evidence if satisfactory the ship is condemned; but if one or more claimants appear, and dispute the legality of the prize, they must exhibit their claims with affidavits annexed, and give security to pay double costs in case the ship and goods be condemned. The claimant's Proctor may then pray that the King's Proctor should alledge, and is also to alledge himself, both parties being Plaintiffs or claimants; and then every thing goes on pretty much as in Summary Causes in the Court of Prerogative, as may be seen by the rules in a cause given in the preceding note.

P R A C T I C E

Of the Criminal Court. Of this I hesitate to speak, having had no experience of it, nor has there been since my knowledge of this Court, to my recollection, any Admiralty commission issued in Ireland, under the Acts of Parliament before mentioned, to try criminals for offences committed upon the seas, nor have I been able to get access to any books of the Register, if any such there be in this country, to deduce from them

the rules of Court in any such cause. I have barely inserted in the note the articles annexed to a list of fees to be taken by the Judge and his seal keeper in such a case, in a cause of this kind which may give some idea of the order of proceedings (53).

In fact, the proceedings are so plainly pointed out by the Acts of Parliament, that they require no detail, and cannot materially differ from the proceedings on any other special commissions to try felonies, and as to what the proceedings were on the original criminal side of the Admiralty Court, it is now an enquiry of mere curiosity.

(53) Commission for the trial of Pirates.

Habeas Corpus to move them.

Precept to receive them.

Pluries Capias against C. D. and others for felony.

Exigent for apprehending them.

Proclamation against ditto.

Precept to Sheriff to summon the Grand Jury.

Ditto. to summon the Petit Jury.

Precept to the Sheriff to attend an execution.

The like to the Constables.

Warrant for the execution.

I observe in looking at some bills of costs in the Admiralty Court, frequent use of the word *sportulate* evidently from *sportula* the old Roman term for the fee given to the *Judices* for their attendance.

Appeals

Appeals

that in t

from a Vi

of Admira

legates: b

in the Cou

cept it be

locutory l

tence (54)

The mo

conformab

al Courts,

contumacy

i. e. the p

the forme

according

The inhibi

(54) For w

or irremedial

son given fo

repaired in a

you may not

it. 54. Bu

istical Cour

the Canon:

(55) Clark

imprison, an

surely it cann

Appeals. The mode of appealing is similar to that in the Ecclesiastical Courts, and may lie from a Vice Admiralty Court to the High Court of Admiralty or from the latter to a Court of Delegates: but herein they differ, that no appeal lies in the Court of Admiralty from a grievance, except it be from a *Gravamen irreparabile*, or interlocutory having the force of a definitive sentence (54).

The mode of proceeding on the appeal also is conformable to that in appeals from the Spiritual Courts, save that in the latter, to punish contumacy and contempts, the Spiritual sword, i. e. the power of excommunication is used; in the former the secular by *imprisonment*, and according to Clarke by *pecuniary penalties* (55). The inhibition not only forbids the Judge to pro-

(54) For what is an *Gravamen irreparabile*, an irreparable or irremediable grievance, see Clarke, tit. 55. The reason given for this rule is, that other grievances may be repaired in an appeal from a definitive sentence, in which you may *non allegata allegare, et probata probare*, Clarke tit. 54. But doth not this reason extend to the Ecclesiastical Courts? It was the rule of the Civil Law, not of the Canon: See ante p. 87.

(55) Clarke, tit. 60. The Court of Admiralty may imprison, and may demand and enforce security, but surely it cannot fine, not being a court of record.

ceed

ceed, but also contains a warrant to arrest the Appellate, and to compel his appearance (56).

The party appellant must give fresh security to prosecute the suit, to pay the costs, to appear in judgment, and to ratify and confirm the deeds of his Proctor, *de lite prosequenda, de expensis solvendis, Judicio fisci, et ratihabitione Procuratoris* (57), for the sureties below are not bound in the cause of Appeal (58).

(56) Clarke, tit. 57 and 58.

(57) This I conceive to be a good description also to direct the form of the stipulation in the Court below in the first instance.

(58) This necessity of the Impugnant's giving new sureties on the appeal, says Clarke, may seem odd, since if the cause be *remitted* to the Court below, the sureties there are bound, as if there had been no appeal; but, says he, you must consider 1st. that upon this last position there has been some controversy. 2dly. Sometimes though the Promovent appeals and succeeds, the cause is not remitted, E. G. where he has recovered too large a sum, and the Court of Appeal deducts the excess, and gives him his just debt. 3rdly. If the Impugnant is condemned on the Appeal upon new proofs in a larger sum than those for which sentence went against him below; in these two last cases, the old sureties would not all be responsible to him. Therefore, says Clarke, in all cases the Impugnant when he appeals must give new sureties.

Prohibition.

Prohibit.

of its jur
exceeds its
petition, (5
Courts of
Bench, an
Courts are
a prohibit
Chancery,
Common

The par
jurisdiction
merely by
what the c
bited, (61
pleading t
declining
hibition u
on the fac
want of j

(59) Wha
Admiralty,
inations to th
(60) 1 P.
(61) In fa
appearance,
(62) In a
late to move

Prohibition. If a Court errs within the pale of its jurisdiction, it is cause of appeal: if it exceeds its jurisdiction, it is subject for a prohibition, (59) which issues out of any of the Courts of Law, most usually out of the Kings Bench, and in time of vacation when the Law Courts are not open (for a Judge cannot grant a prohibition in his chamber) may issue out of Chancery, returnable into the Kings Bench or Common Pleas (60)

The party must take care not to submit to the jurisdiction of the Court, which he doth not merely by appearing, because he cannot tell what the complaint then is till a libel be exhibited, (61) but if he answers the libel, without pleading to the jurisdiction of the Court and declining it, he cannot afterwards obtain a prohibition unless the want of jurisdiction appears on the face of the libel itself, (62) but if the want of jurisdiction appear on the face of the

(59) Whatever is here said of prohibitions to the Admiralty, may be applied with very inconsiderable variations to the Spiritual Courts.

(60) 1 P. W. 43 and 476.

(61) In fact he cannot move for a prohibition before appearance, and a libel exhibited. 1 Salk. 35.

(62) In a court of law, after an imparlance, it is too late to move for a prohibition.

libel,

libel, he may apply for a prohibition even after sentence.

And if the want of jurisdiction do not appear upon the face of the libel, the Impugnant should put in a declinatory exception or plea to the jurisdiction, which if it be overruled, he files his suggestion in the Court of Law, stating the circumstances of his case, and shewing them to be out of the jurisdiction of the Admiralty, and supporting that suggestion by an affidavit, applies for a prohibition, and may be opposed by counter affidavits: but if the point be too nice and doubtfull to be determined on mere motion the Court will direct the party to *declare* in prohibition, that is to prosecute an action, by filing a declaration on a supposition (which is not traversable), that his opponent has proceeded in the Court below, notwithstanding a writ of prohibition (63.)

(63) A sentence of the Admiralty *in partibus transmarinis* may be executed by the Admiralty here, on receipt of letters missive, and *vice versa*. The want of Admiralty reports is a grand *defideratum*. Sir Lionel Jenkins' letters containing a variety of opinions of the great Judge on various and intricate cases, form the best substitute: I have endeavoured to contribute a little aid had it been my good fortune to have been settled in England, I could have given much more.

Chapter

OF THE
PERSONS

BY the v
ritual pow
sometimes
stitution o

In the fi
but three

In the latt
markable a

deacons, R

The Ch

of Ministe

(1) I have

from the usu

ons and pro

VOL. II

Chapter the Sixth.

OF THE SEVERAL ORDERS OF PERSONS IN THE CHURCH. (1).

BY the word order is sometimes denoted a spiritual power or degree in the Church of Christ, sometimes a rank or degree in the frame or constitution of Ecclesiastical polity.

In the first sense, the Church of England knows but three orders ; Bishops, Priests and Deacons : In the latter it has several, of which the most remarkable are, Archbishops, Bishops, Deans, Archdeacons, Rectors, Vicars and Curates.

The Church of England allows but three orders of Ministers because no more are mentioned and

(1) I have in my eagerness to treat of practice deviated from the usual order, in putting the consideration of persons and property after that of actions or suits.

authorized by Holy Writ, and these have existed since the time of the Apostles; these orders the preface before the forms of consecration and ordination directs that no man shall obtain, until he shall be thereto after trial and examination admitted with prayer and imposition of hands *by lawful authority, unless he hath had formerly Episcopal consecration or ordination: by the general expression lawful authority, avoiding to give offence to the Protestant Churches abroad, and by the provision for allowing former ordination, making room for the reception of Romish converted Priests without re-ordination.* Besides these, the Church of Rome admits four and sometimes five other orders, which are called the lesser, and which are distinguished from the greater in this that they are not conferred by imposition of hands. But to understand their distinctions, it is necessary to be more minute. Clerks were by them subdivided into (2) those who were in *Sacerdotio*, those who were in *Sacris*, and those who were *nec in Sacerdotio nec in Sacris*. Those in *Sacerdotio* were divided into such as were in *Altiori Gradu seu ordine*, and those in *Inferiori*. In the former were Bishops, Arch-

(2) Vid. Reeves History of the English Law.

deacons and Archpresbyters, In the latter were Presbyters or Priests.

Clerks not *in Sacerdotio* but yet *in Sacris*, were Deacons and Sub-Deacons ; and those who were *nec in Sacerdotio nec in Sacris* formed the four lesser orders ; though among these sometimes the Sub-deacon and sometimes the Psalmodist is reckoned, so as to make a fifth. These persons were ordained without the Sacramental Unction and without imposition of hands, solely by the Bishops Benediction, with a certain distribution either of vessels or vestments, and they underwent the *prima tonsura*. They were called *Acolythy*, *Ostiarii*, *Lectores* or *Exorcistæ*. The duty of the first was to light the candles, carry the bread and wine, and perform other servile offices. The second was to keep the keys of the church. *Readers* were first appointed in the Church about the third century ; they are noted at the Reformation by being required by the Bishops to subscribe to certain injunctions, and still exist in England upon the foundation of divers Hospitals. The office of the *Exorcist* was to compel by abjuration evil spirits tormenting men, in the name of Almighty God to come out of them.---An office so far from being thought totally nugatory by the reformists, that the seventy-second Canon in England, forbade

any Minister to cast out a Devil without licence from the Bishop of the Diocese ; and in the office of Baptism in the Liturgy of Edward the Sixth, a form of Exorcizing was given.

These lower orders enjoyed the common privilege with the higher ones, that no one could lay violent hands upon such as had received them without incurring the penalty of excommunication, which could not be removed but by the Pope except in the article of death : and persons in the lower orders had this peculiar privilege, that they were allowed to contract matrimony, which those in the superior orders were not, under pain of being deprived of their benefices.

We must not omit the regulars among the religious orders. These, says Corvinus, may be reduced to four ; the Basilians, Benedictines, Augustines and Franciscans ; to which I should think ought to be added the Dominicans : from which, as from their fountains, all the rest flow excepting the Carthusians who use their own statutes. The order of St. Basil is the most ancient of all the religious regular orders. St. Benedict (3) lived about the year 480. The Carthusians, so called from the name of a town, branched off from the Benedictines about the year 1084. The Cister-

(3) St. Benedict is said by many to have been the first that distinguished orders of monks.

tians, called also from a town, were reformed from the Benedictines about 1075. Still all the Monks except those of the order of St. Basil, were only different branches of the Benedictines until about 1220, when the Franciscans and Dominicans (which last are the same with the Jacobins) took new rules. The Augustines originally hermits, were congregated in 1256. The Cordeliers are religious of the order of St. Francis in the strictest observance. The Carmelites are mendicants, and came into England about the year 1240.

In English history and antiquities when we read of Black, Grey, and White Friars; by Grey are meant Franciscan; by White, Carmelite; and by Black, Augustines Dominicans or Benedictines.

If Friar has any peculiar sense, it means a Monk who is not a Priest.

We next proceed to consider the several ranks in Ecclesiastical polity and the several degrees of the Clergy as known to the secular laws in this kingdom.

We begin with the Supreme head of the Church, which is the King. Every man acquainted with history knows the extravagant and astonishing power which the Bishops of Rome acquired in Christendom, under colour of a pretended

tended supremacy in matters Ecclesiastical. Their encroachments, though they certainly advanced in Britain to a most alarming extent, were nevertheless opposed at times long before the Reformation with more spirit and energy than perhaps in any other nation in Europe. With unanimous firmness the feudal Lords of England resisted the introduction of certain doctrines of the Civil and Canon Law, which though favourable to their interests, and even subservient and flattering to their passions, yet were considered as preludes to the general establishment of a code which they dreaded as tending to raise too high Ecclesiastical and Papal power; with the same firmness and anxiety various excesses and abuses proceeding from the See of Rome were repressed abolished and forbidden by several statutes. For instance, it was a constant practice and endeavour of the foreign Clergy, particularly the Italian, to procure livings and benefices in England, and draw out by these means great part of the wealth of the nation, which never returned; many also went from England to pay their court at Rome for the same purposes. This was called purchasing provisions and the persons provisors (4), a name and practice which became in

(4) So called because the Court of Rome *provided* for the supply of those livings.

The

the reig
lerably o
prohibito
ed it in
custody o
nesices b
that no
which ha
so far as
the Bisho
bishop o
Statutes,
incapable
the King
curbed t
Throne,
tion put
restored (
alone; a
sequently
entertain
requisite
how far t
in matter

(5) I say
serted, part
16 Rich. II

the reigns of Edward the First and Third intolerably odious in England, insomuch that it was prohibited by several Statutes which condemned it in severe terms, and declared that the custody of vacancies and the presentments to benefices belonged to their several founders, and that no such right existed in the See of Rome which had at one time exerted this assumed power so far as to give away Bishopricks; for example, the Bishoprick of Ely was given to the Archbishop of Roan. Aliens were also by other early Statutes, long before the Reformation rendered incapable of holding livings in England without the King's licence. Still these restrictions faintly curbed the overweening power of the Papal Throne, until the mighty sweep of the Reformation put an end to its existence altogether, and restored (5) Ecclesiastical Supremacy to the King alone; a power with which some Monarchs subsequently were so delighted, and of which they entertained such exalted notions, that it became requisite at the Revolution to ascertain exactly how far the Prerogative of the Crown extended, in matters Spiritual as well as Temporal.

(5) I say restored, because it had been frequently asserted, particularly by the famous statute of Premunire, 16 Rich. II.

The

The King, therefore, thus restricted within constitutional bounds, is the Supreme Head of the Church, and as such is recognized by the Act of Supremacy. Next to him in the Ecclesiastical State, follow Archbishops, there being no Patriarchs in these countries; a Patriarch meaning the Chief Bishop over several kingdoms and provinces, and formerly the Archbishop of Canterbury was stiled a Patriarch, because he had anciently Primacy not only over all England, but over Ireland and Scotland also; but for these two centuries past the Archbishop of Armagh, has been acknowledged to be Primate of all Ireland (6).

ARCHBISHOPS.

(6) Long after the Archbishop of Canterbury had ceased to claim superintendence over Ireland, violent struggles were carried on between the See of Dublin and Armagh for the Primacy, which were finally determined in favour of Armagh during the prelacy of the celebrated Archbishop James Usher, and very much by the force of his arguments. Similar disputes existed long in England between Canterbury and York. The Archbishop of Armagh is called Primate of all Ireland, because his power of granting faculties, &c. extends through every diocese in the kingdom.

I cannot here omit a just tribute to the English Government, particularly since the Reformation. The

Chair

Archbi
of their c
pal Jurisf
power ov
usually pa
enquiry.
iffues from
shop of t
powers o
and indee

Chair of C
to merit,
during two
birth, who
Nor has
will it be
universally
bly inscrib
universal fa
nently con
The Ar
dispensatio
England by
the similar
the last sec
c. 9. Irish.
VOL.

ARCHBISHOPS.

Archbishops have not only particular dioceses of their own, within which they exercise Episcopal Jurisdiction; but have also a superintending power over all the dioceses in their province, and usually pay them a triennial visit of inspection and enquiry. Upon this visitation, an inhibition issues from the metropolitan to the suffragan Bishop of the diocese visited, which suspends his powers of instituting and directing induction; and indeed all except those of confirmation and

Chair of Canterbury has been without an exception given to merit, with so little regard to great connections, that during two centuries, I recollect but one man of noble birth, who has sat in it.

Nor has Ireland had much reason to complain; nor will it be denied, that in a late instance, that of the universally revered Prelate, to whom this Work is humbly inscribed, both the merit of government, and the universal satisfaction of the public, have been supereminently conspicuous.

The Archbishop of Canterbury's power of granting dispensations to marry at any place or time, is ratified in England by the statute 25 Hen. VIII. and in this country the similar powers annexed to the Primacy, rest upon the last section of the Act of Faculties, 28 Hen. VIII. c. 9. Irish.

VOL. II.

N n

ordination.

ordination. An Archbishop may even proceed to deprive a Bishop, as did an Archbishop of Canterbury proceed against the Bishop of St. David's for simony. 1 Lord Raym. 447.

Upon receipt of the King's writ it was his business to convene the convocation of his province; all appeals are made to him from inferior jurisdictions within his province. Livings if not filled within six months lapse to him. In England Archbishops are also guardians of the spiritualities (7), as the King is of the temporalities *sede vacante*, and have also in that kingdom a customary prerogative of (8) naming a Clerk or Chaplain to be provided for by any Bishop consecrated by them, in lieu of which is usually given to them, the right of presenting to the first benefice they may chuse, that falls vacant

(7) That is in England by prescription or composition; but the Dean and Chapter are of common-right guardians of the spiritualities; were so by the Canon Law, and as I apprehend, are so in Ireland. No such prescription or composition exists here for the metropolitan. It may sometimes be a question of importance, where a Bishop has died without taking advantage of a lapse.

(8) We have no options in Ireland; faint attempts have been made by Archbishops during the inhibition of a See, to claim livings then vacant, but have soon been relinquished.

*

in the d
called an

Bishop
tual gove
from Epi
shops hav
or Presby
divine or
troverted
The sp
played in
ing; and
intending
with or w
in grantin
tuting and

There a
First, t
Secondl
Presentati
a Court ar

(9) Abps
Bishops in i
not necessari

in the diocese of such Bishop, which right is called an option.

B I S H O P S.

Bishops are persons consecrated for the spiritual government of a diocese; the word coming from *Episcopus*, an overseer or inspector. Bishops have long been distinguished from Priests or Presbyters: but whether that distinction be of divine or human right, was formerly much controverted (9).

The spiritual power of Bishops is chiefly displayed in consecrating, confirming, and ordaining; and their Ecclesiastical authority in superintending the manners of the People and Clergy with or without the intervention of their Courts, in granting probates and licences, and in instituting and directing induction to livings,

D E A N S.

There are four sorts of Deans.

First, the usual Dean with a Chapter.

Secondly, He who has no Chapter, and yet is Representative, but has no cure of souls. He has a Court and is not subject to Bishop's visitation.

(9) Abps. were fixed where there had been *Proconsuls*. Bishops in inferior districts. Cities and Bishop's Sees are not necessarily connected in Ireland, as in England.

Thirdly, Ecclesiastical also; but is not preservative but donative, nor has any cure of souls, but is only by covenant or condition as the Dean of Bocking and Dean of the Arches.

Fourthly, Rural Deans.

Dean and Chapter were originally the Council of the Bishop to advise him not only in matters of religion but also in the temporal concerns of the See, such as the setting of leases. When the Clergy was dispersed in parishes, these were reserved for the service of the Cathedral Church.

Dean is so called from presiding over ten, originally the usual number of the Chapter, who together with him are in England the nominal electors of the Bishop. The Bishop may visit them and correct their abuses. By Common Law they had a check over him, since no lease of his would bind his successor unless by them confirmed, until the statute 32 Hen. VIII. Chap. 28. in England and in this country, 10 and 11 Charles I.

A Deanery is a promotion merely spiritual, as appears clearly from the rules of the Canon Law. *Nullus in Decanum nisi Presbyter Ordinetur: Disf. 60. chap. 1, 2, 3.* Though this has been warmly disputed by some who insisted that meer Laymen might be Deans. See the case of Goodman and Turner. Dyer, 273. b.

Title of Dean is a title of dignity, having all the

the quali
to be fo
—custom
only othe
fo where
and Prel
because
power o
them, or
purpose.
Dean by
per name

In Eng
dation.
newly cr
him from
Convent

The c
D'Elire.
from the

(10) W
1633, del
are de me
or collativ
of Judges
are proper
elective, a
dation an

the qualifications of a dignity, which is proved to be so by jurisdiction,—place in the chapter,—custom of the place. The Archdeacon is the only other dignitary; Prebendaries indeed may be so where they have jurisdiction annexed. Deans and Prebendaries are said to have jurisdiction, because in old times they sometimes had the power of granting probates of wills given to them, or of appointing a commissary for that purpose. A grant, lease, or writ directed to a Dean by his name and dignity, though his proper name be omitted, is good.

In England, Deans are of the old or new foundation. Those of the new foundation are those newly created by Hen. VIII. or those changed by him from Abbots and Convents, or Priors and Convents into Deans and Chapters.

The old ones come in like Bishops by *conge D'Elire*. Those of the new by Letters Patent from the King (10).

The

(10) We find the Parliament of Ireland which met 1633, deliberating on the question whether all Deaneries are *de mero jure* donative by the King, and not elective or collative; and it appears by the answer of the Bench of Judges upon the said question, that some Deaneries are properly and *de mero jure* donative by the King, some elective, and some collative, according to the first foundation and usage of those churches. This answer was confirmed

The Chapter is sometimes appointed by the King, sometimes by the Bishop, and sometimes elected by each other, as in Christ Church, Dublin.

A Chapter is not capable to take by purchase or gift, without the Dean who is its head. Mo. p. 51. Eyre's case. They cannot present their Dean to a living. A Dean is obliged to reside eighty days *conjunctim*.

PREBENDARIES.

Prebendaries have been distinguished into simple and dignitary; the distinction of dignitaries being the annexation of some Jurisdiction. The Irish Canons suppose the power of granting probates, &c. to exist in certain Deans and Prebends, by noticing their want of regular registry, and obliging them to return the wills proved into the Bishops Registry. Prebends (11) differ from Canons confirmed by a resolution of the House of Commons. There were but three Deaneries then and now in Ireland which claimed exception from being of the King's gift, on the ground of their foundation rights, viz. St. Patrick's and Kildare elective, and Clonmacnoife collative. St. Patrick's was very lately disputed by the Crown, and the claim of the Crown defeated.

(11) For a good account of Prebend and Prebendal Church. See Sir James Ware.

thus;

thus; the
by being
lege: the
certain r
the churc
maintena

Archde
third cen
ed Bishop
was chose
The Arc
Bishop, a
grew into
beginning
of the ch
in subord
Law the
and hath
Clerks to
Bishop's
us depend
of each p
nerally gr
ten having

(12) See

(13) An

thus ; the last is a spiritual right attained merely by being received into the Cathedral or College : the former a spiritual right of receiving certain revenues, *in consideration* of officiating in the church ; one a name of office, the other of maintenance.

A R C H D E A C O N.

Archdeacons originated about the end of the third century : all Deacons originally attended Bishops in church affairs ; by degrees one was chosen from among the rest for that purpose. The Archdeacon being thus always near the Bishop, and the person chiefly entrusted by him, grew into great credit and power, so that by the beginning of the seventh century he was possessed of the chief care and inspection of the diocese, in subordination to the Bishop. By the Canon Law the Archdeacon is stiled the Bishop's Eye, and hath power to hold visitations, to examine Clerks to be ordained, and in all things to be the Bishop's Vicegerent. (12) But his power among us depends very much on custom and the usage of each particular diocese, and in England is generally greater than in this country, he there often having jurisdiction and a court (13).

RURAL

(12) See the Decretals de *officio Archidiaconi*.

(13) An Archdeacon in the Diocese of Dublin within my

The Chapter is sometimes appointed by the King, sometimes by the Bishop, and sometimes elected by each other, as in Christ Church, Dublin.

A Chapter is not capable to take by purchase or gift, without the Dean who is its head. Mo. p. 51. Eyre's case. They cannot present their Dean to a living. A Dean is obliged to reside eighty days *conjunctim*.

PREBENDARIES.

Prebendaries have been distinguished into simple and dignitary; the distinction of dignitaries being the annexation of some Jurisdiction. The Irish Canons suppose the power of granting probates, &c. to exist in certain Deans and Prebends, by noticing their want of regular registry, and obliging them to return the wills proved into the Bishops Registry. Prebends (11) differ from Canons confirmed by a resolution of the House of Commons. There were but three Deaneries then and now in Ireland which claimed exception from being of the King's gift, on the ground of their foundation rights, viz. St. Patrick's and Kildare elective, and Clonmacnoife collative. St. Patrick's was very lately disputed by the Crown, and the claim of the Crown defeated.

(11) For a good account of Prebend and Prebendal Church. See Sir James Ware.

thus;

thus; th
by being
lege: th
certain r
the chur
maintena

Archde
third cen
ed Bisho
was chose
The Arc
Bishop, a
grew into
beginning
of the ch
in subord
Law the
and hath
Clerks to
Bishop's
us depend
of each p
nerally gr
ten having

(12) See

(13) An

thus ; the last is a spiritual right attained merely by being received into the Cathedral or College : the former a spiritual right of receiving certain revenues, *in consideration* of officiating in the church ; one a name of office, the other of maintenance.

A R C H D E A C O N.

Archdeacons originated about the end of the third century : all Deacons originally attended Bishops in church affairs ; by degrees one was chosen from among the rest for that purpose. The Archdeacon being thus always near the Bishop, and the person chiefly entrusted by him, grew into great credit and power, so that by the beginning of the seventh century he was possessed of the chief care and inspection of the diocese, in subordination to the Bishop. By the Canon Law the Archdeacon is stiled the Bishop's Eye, and hath power to hold visitations, to examine Clerks to be ordained, and in all things to be the Bishop's Vicegerent. (12) But his power among us depends very much on custom and the usage of each particular diocese, and in England is generally greater than in this country, he there often having jurisdiction and a court (13).

RURAL

(12) See the Decretals de *officio Archidiaconi*.

(13) An Archdeacon in the Diocese of Dublin within my

RURAL DEANS.

Rural Deans were deputies of the Bishop dispersed round his diocese, to inspect the conduct of the Parochial Clergy, to enquire into and report dilapidations; they still make their returns at Visitations, and have been in this kingdom, where they had been dispersed, usefully and effectually restored in late years; in some instances, by venerable Prelates now living. (14)

RECTORS.

Rector is the Parson, persona; he is one that hath full possession of all the rights of a parochial church.

He is called Parson, because by his person the Church an invisible body is represented.

He is in himself a body corporate, in order to protect the rights of the Church by perpetual succession.

my recollection, granted licences and endeavoured to assume Archidiaconal jurisdiction, but was repressed by the superior power of the then Archbishop of Dublin.

(14) Particularly by a most active friend to the church the Archbishop of Cashell, in whose diocese the number of new churches forms a striking proof of his abundant care.

He ha
of the p
dues; un
appropriate
to some
gregate.

He ha
lified inh
an estate

A Rec
the church

The R

within the

right to b

to the pro

an action

at (15).

Though

he is entitl

facto.

(15) If th

the church y

and gets cor

and soil of th

Vicar. Wat

afe, Vicar v

VOL. II.

He has in himself during his life the freehold of the parsonage house, glebe, tythes, and other dues; unless they be, as they sometimes are, appropriated, i. e. the benefice perpetually annexed to some spiritual corporation, either sole or aggregate.

He hath for the benefit of the Church a qualified inheritance; but as to his successors, only an estate for life.

A Rectory cannot subsist without land, but the church yard is sufficient.

The Rector only can grant licence for burials *within the church*; but the parishioners have a right to bury in the church yard. He is entitled to the profits of the church yard, and may bring an action for breaking into it, and may demise it (15).

Though admitted on a wrongful presentation, he is entitled to his tythes, for he is Parson *de facto*.

(15) If there be a Vicarage endowed, *quere* is not the church yard in the Vicar? It is he that is inducted, and gets corporeal or actual possession, and the freehold and soil of the body of the church is *for that reason* in the Vicar. Watson. p. 304. The point occurred in a late case, Vicar v. Parishioners of St. Andrew's, Dublin.

VICARS.

The Vicar was formerly an officiating temporary Minister, like our present Curate.

The origin of Vicarages endowed, and appropriations was as follows:

Tythes were parochial in the Saxon times. The Normans began arbitrary consecrations of them, and gave to the Monks the patronage of parishes.

The Monks instead of presenting, seem first to have served the Cures themselves.

Secondly, Then to have served them by Curates with salaries.

Thirdly, To have presented persons from whom they received pensions.

Fourthly, Not to have presented at all, but reserved, that is appropriated (16) the profits to themselves in general or to some particular Prebend, and to have served the Cures by Vicars giving them part of the tythes; but as it was very uncertain how much they were to have, and their portions constantly encroached upon,

(16) The difference between appropriations and impropriations is, that the latter are such as are, though *improperly*, in the hands of Laymen. Vide 1 Black. p. 386.

the Bishop
carages b
directed
chap. 6.
statute a
a secular
house, an
movable
sufficient
Ordinary
These
scription.
pend on
tythes are
At the
ended had
who gran
There
rishes wit
Curacies i
rates. It
of late y
(17) and t
endowmen
the incur

(17) See
the late Prin

the Bishops were forced to insist upon these Vicarages being endowed, and were indeed expressly directed to do so by the English stat. 15 Ric. II. chap. 6. and 4 Hen. IV. chap. 12.—Which last statute also ordained, that the Vicar should be a secular person, not a member of any religious house, and should be Vicar perpetual and not removable at the caprice of the Monastery, and also sufficiently endowed at the discretion of the Ordinary.

These endowments depend on grant or prescription. What they are is uncertain, and depends on proof of customs. In general the small tythes are the Vicar's.

At the reformation appropriations would have ended had not statutes vested them in the King, who granted them out to private impropiators.

There still remained certain appropriate parishes without Vicarages endowed or perpetual Curacies in them, but served by stipendiary Curates. It has been the study of the Legislature of late years, to erect in these chapels of ease, (17) and to make them perpetual cures, capable of endowment. The Curates are nominated by the incumbent or impropiator, who give them

(17) See 11 and 12 Geo. III. ch. 49. acts introduced by the late Primate.

salaries, unless they choose to endow. Tythes still belong to incumbent, who, though a Layman, has cure of souls, unless he be literally an appropriator, such as the Prebend of a Cathedral having a sinecure, but residents within the district of the chapel do not contribute to the repairs of the mother church, being exempted by the act 11 and 12 G. III. ch. 16. Irish.

SINECURES.

Monasteries, by parting with the appropriation to individuals, created and gave origin to sinecures; which are defined, preferments not having locally the cure of souls.

Another species of sinecures arose from Rectors appointing a Deputy or Vicar, and giving him a share of the tythes, whereby he supposed himself to have got rid of the cure of souls.

NONCURES.

Noncures are where there are churches in ruins, so called because no divine service is there performed, yet they have cure of souls, and require a faculty.

CURATES

The
Benefice
appropri
ed by w
mensam n
In the
law to a
parson;
benefice
porary C
When
charge o
taken ca
they not
themselv
persons t
the cure
petual; t
of the A
of the li

As to

CURATES.

PERPETUAL.

The origin of perpetual curacies was this: Benefices when given to monasteries were either appropriated to their use, in *proprios usus*, or granted by way of union, *pleno jure*, that is, given *ad mensam monachorum*, and annexed to their table. In the former case the monastery was forced by law to appoint a Vicar, who was to be a secular parson; but in the latter, the Monks served the benefice by one of themselves sent out as a temporary Curate as occasion required.

When religious houses were dissolved, and the charge of providing for such Cures as had been taken care of by them transferred to lay persons, they not being capable of serving them by themselves, were obliged to nominate particular persons to the Ordinary, for his licence to serve the cure. By this means the Curate became *perpetual*; that is, was not removable at the pleasure of the Appropriator, nor without *due* revocation of the licence of the Ordinary.

CURATES.

TEMPORARY ASSISTANT.

As to Temporary Curates the substitutes of beneficed

beneficed incumbents, few legal observations can be made. They as well as perpetual, ought to be licenced to preach by the diocesan; this is enjoined by the Canons, and was the law before the Canons were made. If such license be refused without just reason, a mandamus will lie to the Bishop (18). But the granting it is discretionary in the King's Bench, the Judges of which have refused it where there were two claimants of the same perpetual curacy, because each might have had *quare impedit*. If Rector gives a title to the Curate, he cannot remove him at pleasure, (19) and the Curate can maintain assumpsit for his stipend.

Curates may be removed by a succeeding incumbent, because he never applied to have his licenced. Cowper, 437, 445.

The Rector may also remove them, saying he will serve the Cure himself; but in this case the Bishop may for good cause, refuse to withdraw the licence.

(18) So says Woodeson, quoting Lord Raymond, 1206, but the case in L. Ray, is about a donative, not a curacy; and the words are, *if a Bishop, since the act of uniformity, deny a licence to a person who is fit to preach, mandamus will go.*

(19) See the remarkable case of Martin v. Hind. Cowper, 437. Ordaining on title supplies the place of an *express* licence. Ibid.

Bishop

Bishop for cause may withdraw Curate's licence summarily; if he did it without cause, I apprehend mandamus would lie to restore. I argue from analogy, not authority. It is made a *quere* in Martin v. Hind.

Curates ought to be properly qualified. Their qualifications are set forth in Watson, p. 235. fol. edit.

The payment of Curate's salary is provided by 6 G. I. ch. 13. and 1 Geo. II. ch. 22. See also Bol. 115, 3.

L E C T U R E R S.

Lecturers are assistants to the Rectors of Churches, generally chosen by the Vestry or Chief inhabitants, and are usually the afternoon preachers; they are much less frequent in this country than in England. In London they are numerous. The evening lecture at Werburgh's supplied by one of the Fellows of the College, is among the most remarkable in Dublin. A man cannot properly be a lecturer without a licence from the Bishop or Archbishop; but their power is only as to the qualification and fitness of the person, and not as to the right of the lectureship. The Irish Canons require that lecturers should be licenced, which is also made necessary by

by Irish statute, 17 and 18 Ch. ch. 6. and the same statute requires their assent to the 39 articles, and to the common prayer on pain of disability, and inflicts three months imprisonment in case of preaching during disability.

CHURCH-WARDENS.

They are the guardians or keepers of the church and representatives of the body of the parish, by the Canon Law and the old Law of these realms; they are appointed one by the minister, the other by the parishioners, unless custom supercedes the rule, for established custom will prevail over it; if they be not elected by the persons thus authorised, the appointment will lapse to the Bishop.

They are so far incorporated by the law as to be able to sue for the goods of the church, to have a property in them, and to purchase goods for the use of the parish; but they cannot dispose of them without the consent of the parish, and licence of the Ordinary (20); and they have no interest in the lands, or other real property (as the Church or Church-yard) nor are they a cor-

(20) Of the former, because they are the goods of the parish; of the latter, because they appertain to holy things, of which the Ordinary had the care,

poration

poration
take by
Parish fo
in seoffee
Church-w
waste the
called to
cessors, w

(21) By
within a
deliver up
Succesfor
er and 22
Bishops to
their prede
they themse
Tricks w
Churchwar
therefore b
provided th
officers and
their electio
by incumb
ence of th
not signed b
take the o
tation.

VOL. II.

poration in such sort as to purchase lands, or take by grant, and therefore lands given to the Parish for the use of the Church must be vested in feoffees in trust, and not be given to the Church-wardens and their successors. If they waste the goods of the Church they may be called to an account in an action by their successors, when removed, but not before (21).

Parish

(21) By the 87th Canon, at the end of the year or within a month after, they must give an account, and deliver up goods to the Parishioners.

Successors frequently neglected to sue, therefore by 21 and 22 Geo. III. Irish. ch. 52. power is given to Bishops to sue the succeeding Churchwardens, as if their predecessors had fully accounted with them, tho' they themselves had neglected to sue those predecessors.

Tricks were also frequently used to avoid the office of Churchwarden, by neglecting to take the necessary oaths; therefore by stat. 23 and 24 Geo. III. ch. 49. it was provided that Churchwardens should be deemed legal officers and made accountable after six weeks entry of their election in the vestry book. And this entry signed by incumbent and three parishioners is conclusive evidence of the election against the Churchwarden, though not signed by himself. Before this act, if he refused to take the oath, there was no remedy but by excommunication.

PARISH CLERKS.

Parish Clerks were formerly real Clerks. They are *temporal* officers, to be deprived only by those who appointed them. Spiritual Courts cannot deprive them, but may punish for enormities. On application for a Mandamus, K. B. will determine on the merits of the deprivation.

They are chosen by Parson or Vicar, unless otherwise by custom, and if no choice within 40 days from the vacancy, Bishop appoints.

They should be of 20 years of age, of honest conversation, sufficient for reading writing and singing, and speaking *Irish* where many *Irish* re-

The exemptions from serving the office of Churchwarden partly depend on privileges annexed to the nature of certain situations, such as Peers, Clergymen, Members of the House of Commons; partly on statutes. Thus by 6 Wm. III. ch. 4. in England, certain medical persons are exempted, and by 6 Geo. I. in Ireland, dissenting teachers are exempted and all dissenters may appoint deputies.

The duties of Churchwardens are well summed up by Oughton in a note to tit. 151. They depend partly on the Common Law, partly on the Canon, partly on acts of Parliament. They continue in office but one year, but may be re-elected, as the junior by custom often is.

fidents

fidents, and must perform their duties in their own proper person (22).

They were originally supported with the profits of the holy water and called *aquæ Bajuli*; in the room of this the Canons allowed a reasonable sum payable by the parishioners.

Statutes subsequently made suffered them to complain to two Justices if their salary was not levied, obliged the parish to assess and applot it from a sum of five pounds to twenty, and on their failure first empowered Justices to applot, and afterwards enabled the Clerk to sue the Church-wardens for the sum usually granted (23) and the Church-wardens to sue the parish.

S E X T O N S.

The *Sacrista* or keeper of the holy things belonging to divine worship was the same with the *Osfiarius*; he is appointed by the Minister or

(22) They are usually licenced, but licence said not to be necessary in Peak and Bourne, Strange 142. If elected by custom by the Parishioners, they only can displace, but Bishops may excommunicate, Strange 115. said in Peak and Bourne, that they can make a deputy.

(23) 7 G. II. ch. 7.—23 G. II. ch. 12—25 G. III. ch. 58. They could by the 23 G. II. sue the Churchwardens if they neglected to raise the money applotted.

others (24) according to the custom, and those who appointed him may remove him at pleasure, but if the custom has been that he should have it for life, a Mandamus lies to restore him. Women may be Sextons, and may vote at the election of them, because the office doth not concern the public (25).

Having before observed that orders of persons in Ecclesiastical Law may mean either orders in the Ecclesiastical State, or orders in the Church of Christ, and having treated of these distinctions in both these lights, I now proceed to discuss the manner in which persons arrive at these orders; I shall first consider how the sacred orders are attained, viz. by *Consecration* and *Ordination*, and afterwards how persons become Prelates, Rectors, and Vicars, in Ecclesiastical Polity connected with the civil state.

The orders in the Church of Christ are those of Bishops, Priests and Deacons. Bishops become so by Consecration, Priests and Deacons by Ordination.

(24) Not many years since there was a great contest in the parish of St. Anne, Dublin, on this subject between the Minister and Parishioners.

(25) *Olave v. Ingram*, Strange 1114. Women have held more important offices. A lady was returning officer at Aylesbury, *ibid*.

C O N-

CONSECRATION.

The forms of Consecration are well known (26). The effects of Consecration are that the Bishop may sue for his temporalities which he cannot before though elected or appointed and confirmed (27), and the dignities or benefices which he possessed become not void 'till after consecration; if translated he is not consecrated again but confirmed, and his former Bishoprick does not become void 'till after confirmation (28).

ORDINATION.

On the last head there was little to observe; on this, questions more frequently arise. The first

(26) The mysterious meanings annexed to parts of this form in the Romish Church, perhaps are not so well known. The ring was a token of his marriage with the Church, the mitre as a helmet of strength and salvation, his head being armed with the horns of both Testaments, his gloves as a token of clean hands; but these ceremonies as not favouring of the simplicity of the Christian Religion are rejected by Protestants.

(27) But election and confirmation enable him to exercise all spiritual jurisdiction.

(28) Therefore a commendam before consecration comes time enough.

thing

thing to be considered as to Ordination, is the *proper period* for holding it, which by the Canon Law and our own Canons was to be at stated times, but now is done as the Bishop may please upon any Sunday or Holiday, though the Rubric seems to dispense with the rule only on *urgent* occasions (29).

The next consideration is the *age* of the person to be ordained which should be 23 for a Deacon, 24 for a Priest [30].

(29) *Times for Ordination.*—By the Canon Law the regular times were the Ember weeks, and the Sunday before Passion Sunday. The Pope alone had this power on common Sundays and Holidays. Two orders could not be given on the same Sunday. Persons ordaining at wrong times suspended. Our 29th Canon requires it to be on Sundays after the Ember weeks, in public Church, in time of Divine Service, in the presence of the Archbishop, Dean, and Prebendaries, or four other grave persons being Masters of Arts, and no person to be made Deacon and Presbyter the same day.

(30) *Age for Ordination.*—Twenty-five age of a Deacon by the Canon Law, 23 by the Council of Trent. By English statute 3 and 5 Edw. VI. for a Deacon 21. By the Preface of our form of Ordination confirmed by the act of uniformity, 23 for a Deacon. By the English statute 13 Eliz. ch. 12. 24 for a Priest, but this is

The party if of sufficient age must be *examined*, and not ordained unless found sufficient, and this examination by the Canon Law always was the office of the Archdeacon where the Bishop had any impediment, and was to begin the 4th day before the Ordination, and the Candidates were examined three whole days [31].

By the 31st Canon Irish. No person is to be ordained (not of the Bishop's own diocese) except he be a *Graduate* of *some* University in the King's dominions, or except he bring *letters di-*

so only by our rubric and Canons here. So that in fact, in Ireland, I conceive the age neither of Priest or Deacon is fixed by Statute, though Bol. speaks as if it were, but it is by the rubric, (which rubric certainly is confirmed by act of parliament,) and by the Canons, vid. Canon 31. If presented to a parish before legal age may be libelled against; a Deacon not to be made Priest till the end of a year from taking Deacons orders. Orders are not a sacrament, because they have not any visible sign ordained of God, 35th article.

(31) As to this examination, Lyndwood refers to the Canon Law, requiring that the Priests who examine for the Bishop should examine the *life, age, and title* of the person to be ordained, *where educated, how learned,* and whether instructed in God's Law.

missory

missory (32) from the Bishop of whose diocese he is, or at the least, except he be able to give an account of his faith in Latin, and to confirm the same by testimonies out of the Holy Scriptures. And except moreover he exhibit letters testimonial, or an authentic certificate of his life and conversation, under the seal of some college, or of 3 or 4 grave ministers, with the subscription and testimony of other credible persons who have known his life and behaviour for three years before. *Examination* is further enforced by the 32d Canon, and the penalty on persons ordaining those who are not so qualified and examined is suspension from making either Priests or Deacons, for the space of two years. By the Canon Law, they were interdicted from doing so for ever, and every person to be ordain-

(32) LETTERS DIMISSORY.

The Archbishop, as Archbishop, cannot grant letters dimissory, nor the Archdeacon or Official—Vicar General may, if the Bishop be in parts remote. Persons to whom they are granted should be born in the diocese, promoted in it, and resident in it. Letters dimissory may be granted at once *ad omnes ordines*, and directed to any Bishop. In England, Fellows of New College Oxford—St. Mary's Winton,—and King's College Cambridge, want no letters dimissory.

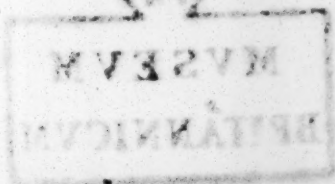
ed must in Ireland declare his consent to the four first Canons, as he does in England to the 39 articles, or part of them.

The English statute 13 Eliz. ch. 12. only requires a certificate from persons known to the Bishop to be of sound religion, and excuses an ignorance of the Latin tongue, if the person have special gift or ability to be a Preacher.

The person to be ordained must shew some title or nomination, that he may not through want of provision be tempted from distress to bring scandal upon the Church. This is required in Ireland by the 30th Canon which took away the title of *patrimonium suum*, and of a pension, and for known abilities. I have known an action commenced against a Bishop for ordaining without a title (33).

Having now spoken of the manner in which persons obtain sacred orders, I proceed to treat of the mode by which they are invested and en-

(33) But it being merely by the Canons, I think no action lies, but only citation from the Bishop's Court, and order from thence, to maintain him till preferred, which if disobeyed, the Canon operates, but what can be the sanction if the citation be against the Bishop's Executors, as Bol. p. 200. mentions it to have been in one instance. In Ireland clearly no action lies, for the Canon points out a specific penalty, viz. suspension from the power of ordaining for one year.



dowed with certain ranks and degrees in Ecclesiastical polity, or in other words the methods in which they become Bishops, Deans, Rectors, Vicars, &c. &c. viz. by election or appointment, donation, collation with induction, or presentation with institution and induction.

ELECTION OR APPOINTMENT.

Election may be of Bishops, or of Deans or other dignitaries. All Bishops were at first elected by the Laity and Clergy jointly; these elections becoming tumultuous, Princes assumed the right of confirming them, and of granting investitures of the temporalities annexed, which were *per annulum & baculum*. This negative of the Crown made the Laity indifferent about these elections, untill at last the Pope contrived to exclude them entirely. The Pope then disputed with the Monarchs of Europe their right of investiture, but these consenting to do it *per sceptrum*, the Holy See was forced for a time to relinquish its pretensions. The concessions of King John in England, again restored to the Clergy an entire and uncontrolled freedom of election both of Abbots and Bishops, till at the reformation, the confirmation of the King was again made necessary by Statute [34] and the

(34) 25 Hen. VIII. ch. 20.



present mode of election on a Conge d'Elire was introduced.

This mode of Election then being mere form, since if the Kings letter missive naming the person to be elected were disobeyed, either the King would nominate, or the electors would incur the penalties of a *Premunire*, and the Bishopricks of the new foundation being donative, and all Irish Bishopricks being so by 2 Eliz. chap. 4. it may seem of little use to enquire into the *Canonical* mode of elections, but the election on the *Conge d'Elire* proceeding *seemingly* from beginning to end without any restraint from the letters missive, and Dignitaries in chapters being still sometimes elected, and the rules of the Canon Law tending to throw great light upon elections in Colleges, I have in a note subjoined some observations thereon (35).

Bishops

(35) There were three kinds of Election by the Canon Law. 1. "*Per Compromissum* celebratur electio cum plures idonei viri eliguntur, in quos omnium vice eligendi certo modo facultas & potestas transfunditur. 2nd. "*Per inspirationem*, cum electores nullo precedente tractatu, quasi divini spiritus impulsu simul omnes in unum repente consentiunt. 3d. *Per Scrutinium*, cum presentibus omnibus qui debent & volunt & possunt

Q q 2

" commodè

Bishops and Deans therefore in Ireland, and on the new foundation in England, are directly ap-

“commode interesse, tres de Collegio fide digni assu-
 “mantur qui secrete & sigillatim vota cunctorum dili-
 “gentur exquirant, & demum in scripturam redacta
 “publicent. Quo facto, collatione habita, is demum
 “censetur electus, in quem omnes vel major & sanior
 “pars Capituli consentit.”

These modes of Election are directed in the 42d Chapter of the first book of the Decretals of Pope Gregory and sixth title published 450 years since, and said there to be introduced *propter diversas electionum formas* which had antecedently prevailed, and the last mode *per scrutinium* is evidently the prototype of the usual modes of election in our Cathedral Churches and in many Colleges, and particularly of Fellows and Scholars in the College of Dublin, the addition of giving the votes *simul & smel*, being found the latter in the same title of the Decretals, cap. 58. where it is said, *Publicato seminio variare nequeunt electores*, the former in the Glosses on the Canon Law, which say, *si consentiant singuli et non Collegialiter, non valet*, which rule was particularly insisted on in the famous case of the Dean and Chapter of Ferns relative to the validity of a lease in Sir John Davis's Reports, in which case it was determined that to make the acts of the Dean and Chapter good, they must be capitularly assembled in one place, and that a consent given by the members in several places and at several times will not do, though the

pointed by the Crown, by Letters Patent, and so are Prebendaries in many places, as at Windsor,

place of assemblage need not be the Chapter-house, nor need the whole Chapter be present.

This being the case, I cannot but think with Dr. Burn, that where statutes are doubtful or undetermined on this subject, the mode in which the difficulty in question has been resolved by the Canon Law is the true key to its solution, and in some late most able and learned disquisitions has not been sufficiently attended to. If modern interpretations differ from the known and ancient methods of explication by the Canon Law, from the probabilities arising from the history of the times, and from long established practice, I am apt to think that they favour more of genius and of that subtilty of construction which finds a ready and pleasing reception with the ingenious minds, than of reality.

Thus for instance I cannot accede in opinion to that doctrine now carried into practice in the College of Dublin, that any majority among the Electors, though not a majority of the whole, prevails in the election; for instance, that if of eight electors, three vote for the first Candidate, two for another, two for a third, and one for a fourth, the first is elected, (though this construction is adopted by Dr. Christian and other able Lawyers), because I find the Canon Law expressly saying the contrary, in the first book of the Decretals, tit. 6. ch. 48. and again in Sexto Decretalium, lib. 1. tit. 6. cap. 23. where it is said *electio in quem non major pars, sed plures de Capitulo*

for and Westminster, without either institution or induction, the Irish Statute 2. Eliz. and the English act 1 Edw. VI. chap. 2. (which did for a time abolish the mode by *Conge d'Elire*), in England reciting truly that such were in reality no elections, but only colours, shadows, and pretences of elections. The Prelates and Dignitaries thus appointed, are afterwards enthroned or installed according to their degree; and under this head of *appointment* may also be classed *Nominations* to perpetual Curacies.

pitulo quam in quemquam alium vota direxerint, robur non obtinet firmitatis. And Burn in his Ecclesiastical Law, title Cathedrals, Vol. I. p. 258. 8vo. says, "by the
 "majority is meant the majority of the whole number of
 "Electors; therefore, if there are seven Electors, and two
 "of them chuse one person, and two another, and three
 "another; he who has three votes shall not be duly
 "elected, as not being chosen by the majority of the
 "Electors." Where then would the appointment go in
 such a case? By the Canon Law to the next superior,
 or to the Pope: by ours I think to the Founder, if he
 has not provided for the case by the statutes, which I
 think with us he hath.

The Election by the Canon Law was to be in three months, otherwise the right of Election lapsed to the superior. By English statute 28 Hen. VIII. (when on a *Conge d'Elire*), must be in twelve days, otherwise the King may nominate.

Donations.

Donations.—Near of kin to appointment is Donation, and Bishopricks were Donative in England from the conquest till the reign of King John, but though grants of the King to Prebends without institution, and Collations of Bishops without presentation, and the nomination to perpetual Curacies without either presentation institution or induction, all resemble donations, they are not donations, for collations and royal grants are to be followed by installment or inthronization, and persons nominated to perpetual Curacies must be licenced by the Bishop, whereas donatives are given and *fully possessed* by the sole donation of the patron in writing.

Though the Clerk, upon whom a donation is bestowed doth not gain possession by presentation, institution, and induction, yet in other respects he is to qualify himself like those who do (36).

Donatives are within the provisions against Simony, and where they have cure of souls they are likewise within the Statutes against pluralities. The Ordinary cannot visit a donative, but

(36) What these qualifications are, we shall see hereafter in treating of that latter and more usual way of getting possession of a benefice.

the

the Patron must visit the same by Commissioners to be appointed by him, and by consequence a donative is freed from procurations, and the Incumbent, (according to Dr. Gibson), is exempted from attendance at visitations; yet the Ordinary if he commits a misdemeanor may proceed against him by Ecclesiastical censures.

I proceed to the most usual methods of becoming a *Parson* or *Vicar*, viz. by *Presentation*, *Institution*, and *Induction*, where the benefice is in the gift of some person distinct from the Bishop of the Diocese: by *Collation* (37) and *Induction*, where it is in the gift of the Bishop himself.

PRESENTATION.

Is an offering of the Clerk to the Ordinary, and is distinguished from *Nomination* which sometimes means the offering of a Clerk to him that hath the power to present but has granted the power to nominate for that time to another (38).

Popish Recusants are disabled from presenting till they conform. In mean time right of presentation devolves to the King, 17 and 18 Ch. II. ch. Irish, 2 Ann ch. 6. Irish, in England to the Universities.

(37) Collation is sometimes compared to presentation, but it rather corresponds to institution.

(38) Excommunicated persons attainted or outlawed, and

An Alien who is a Priest may be presented to a Church. A Deacon or even a Layman may be presented, but he must be made a Priest before he can be instituted, by the act of uniformity (39). By the same act a Deacon cannot consecrate the Sacrament. The presentation must be within six months after the vacancy, but then it concerns the Patron not to wait till the six months are near expiring, because if he does, the ordinary may alledge, that he hath not time to examine the Clerk; or if the ordinary refuse the Clerk for inability, the patron may not have time to present anew within the six months. and so lapse may incur.

The general doctrine seems to be that the King only can *revoke* a Presentment (40), yet it is said a common person may, and the real distinction seems to be that the King alone can revoke after institution, but a common person may before, and a common person may certainly *vary* his presentation, that is, after one presented, and before admission, present another. But this pow-

and the King presents for that turn not the patron: Guardian by nurture, or by focage of a manor whereunto an advowson is appendant cannot present.

(39) 17 and 18 Ch. II. ch. 6. Irish.

(40) Eatch 191.

VOL. II.

R r

er

er of varying belongs to Lay persons only, and not to Ecclesiastical, because they are supposed in Law to be competent judges of fitness; formerly a common person might present by Parol, but then the Patron must declare it in presence of the Bishop; if in writing, it is no deed, but in the nature of a letter missive to the Bishop. A Corporation aggregate must present under their common seal, and since the Statute of frauds all presentations must be in writing. If a Corporation in presenting mistake the name of their foundation, the presentation is void.

The Clerk may be *refused* if the Patron be excommunicated, or the Clerk himself an unfit person, either from want of ability in learning, or honesty of conversation. If the person presented be a bastard and not dispensed with (41), outlawed, excommunicate, a layman (42), under age, a man of ill life or conversation, a heretic, schismatic, alien, the Bishop may refuse; but on Q. Imp. brought, he must shew the cause of his refusal specially and directly, and even though the matter be of a spiritual nature, it shall be

(41) This is not thought of in modern times.

(42) Formerly it was thought that if a layman were instituted by some fraud on the Bishop, acts done by him were good.

tried by a Jury, but in case of refusal for insufficiency in learning it hath been adjudged that in *literatura minus sufficiens* is a good plea, and the Bishop need not set forth the kind of learning, nor the degree in which he is deficient (43), but the Court may write to the Metropolitan to re-examine him, and his certificate is final.

INSTITUTION AND COLLATION.

Institution was not practised before the reign of Henry the II. The patron indeed was used to present his appointee if then a layman to be ordained, but if he was already in orders, he became possessed of the living by the mere donation of the Patron.

Institution is a kind of investiture of the spiritual part of the benefice, for by institution the cure of the souls of the parish is committed to the charge of the Clerk.

The mode of institution is this; the proper oaths having been taken and subscriptions made, (44) the person to be instituted kneels down before

(43) See stat. 9. Edw. II. st. ch. 13.

(44) These subscriptions are in England to the 39 Articles or part of them, in Ireland to the four first Canons, for

fore the Ordinary, who pronounces the words of institution out of a written instrument drawn before hand for that purpose with the seal Episcopal appendant, which the Clerk during the ceremony is to hold in his hand. The letters or instrument of institution are then given to the Clergyman, and are also registered.

The

it is observable that in Ireland it is not necessary, either at ordination, institution, or taking degrees in Colleges, to subscribe the 39 Articles or any of them, about which subscription there has been so much controversy in Ireland; and I cannot help observing here that with some analogy the test act so often vainly attempted to be repealed in England, and so strongly supported in Ireland by her most celebrated son Dean Swift, was a few years since repealed in Ireland sub silentio, with probably scarce the knowledge of 500 persons in England. I speak of extraordinary facts, I am not giving any opinion.

The oaths required at institution, besides those of allegiance and supremacy, are those of simony, canonical obedience, and if it be a vicarage, of residence, as follows:

1st. The oath of Simony.—I do swear that I have made no simoniacal payment, contract or promise directly or indirectly by myself or by any other to my knowledge or with my consent to any person or persons whatsoever, for or concerning the procuring and obtaining of this ecclesiastical dignity place, preferment, office or living
(respectively

The Bishop need not institute in person, he may give a fiat to his Vicar General, Chancellor or Commissary to do it. and if the Chancellor commit any irregularity, the Bishop is answerable. If Registers are negligent in keeping Registry of institution, Patrons may have *Certiorari* to the Bishop to certify them into Chancery.

There is no manner of difference between institution and *Collation* as to the action itself but this, that the Bishop doth not *present* to such

(respectively and particularly naming the same whereunto he is to be admitted, instituted, collated, installed or confirmed) nor will at any time hereafter perform or satisfy any such kind of payment, contract or promise made by any other without my knowledge or consent, so help me God through Christ.

2nd. The oath of Canonical obedience.—Ego, A. B. juro quod præstabo veram & canonicam obedientiam episcopo—ejusque successoribus in omnibus licitis & honestis, sic me Deus adjuvet.

Which oaths seems to be meant in the following clause of the Canon Law—Nullus Episcopus clericos suos (nisi forte quibus ecclesiasticarum rerum commissa fuerit dispensatio) sibi jurare compellat.

3. The oath of Residence upon a Vicarage.—Ego, A. B. Juro quod ero residens in vicaria mea nisi aliter dispensatum fuerit a diæcesano meo.

livings

livings as are in his own gift, but immediately institutes his Clerk, in much the same form as he or his Vicar General institutes a Clerk presented by any other *Patron*, and accordingly the words of the instruments are nearly the same (45).

(45) But the effects of institution and collation are different. By institution the Church is full against all persons but the King, and against him claiming in right of a common person, Mo. 448. No other Patron, or pretended Patron, can oblige the Bishop to institute another Clerk, till he that was at first instituted be by due course of law removed *, and plenarty by six months is pleadable against all persons, but the King.

The Clerk by institution has the cure of souls committed to him, and is answerable for neglect of duty in this point.

He that is instituted may enter on the glebe, and take the tythes, but cannot let, grant, or sue for them, and collation has all these same effects, except as to plenarty. For by collation the Church is not full, nor is plenarty by collation pleadable, but the right Patron may bring his writ, and remove the Collatee *at any time*, unless he be such Patron, who hath also a right to collate, for against him plenarty by collation is pleadable, Bol. 1057. 6 Rep. 29. 6. 50. a.

* And as a proof that the Church is full by institution; if a common person hath the next avoidance, and presents, and his Clerk is admitted *and instituted*, and dies, his turn is served.

And

Whether the power of institution be local, was made a question in the reign of Charles I. and does not seem yet to be clear Law, but I appre-

And the reason why collation does not make a plenarty is, because then the Bishop would be judge in his own cause to the great prejudice of Patrons; and therefore the Bishop's collation in this respect is interpreted no more than a temporary provision for celebration of Divine Service, till the Patron do present, 1 Inst. 344. 6 Bol. 1057.

But collation creates a plenarty against a metropolitan or other collator.

The effects of collation and institution then are the same, if the Bishop's title be good, but if not good, collation as *we have said* makes no plenarty against the King, or a Layman, but the Bishop is bound to admit their Clerk, *when presented*, unless he has some other plea besides plenarty; but till that be done, the Clerk that was collated is Incumbent, as to all Ecclesiastical Matters, and shall receive tythes, offerings, &c. &c.

Institution then and six months make plenarty, collation, (though *any time* whatsoever follows, before Qu. Imp. brought) does not make a plenarty according to the books, but in Qu. Imp. Lord De Clifford v. Webb, not long since in Ireland, where the Plaintiff took steps within the six months, but afterwards lay by for six months, the Plaintiff's council seemed to suppose or admit that plenarty had incurred unless they could revive the former proceedings and attach the present time to that, by Journey's Accounts.

Plenarty

I apprehend the better opinion is that it is not local, but follows the person of the Ordinary wherever he goes, although there are extant many commissions granted by Archbishops to Bishops to institute out of their Diocese, which shews the ancient opinion, that without such leave, if the act was not thought invalid, at least it was thought irregular: yet Lyndwood lays it down generally that all acts of voluntary jurisdiction may be expedited out of the Diocese, and it is not material under what *seal* the institution passes. 3 Cro. 341.

By institution the Church is full, but plenarty is not pleadable till after six months.

Institution taken from an improper hand may be confirmed by the person from whom it ought to have been taken, as E. G. an institution given by a Bishop suspended, or by a Bishop pending a metropolitanical visitation.

A Church being full by Institution, if a second institution be granted to the same Church, this is a *super* institution; this is properly triable in the Spiritual Court unless induction hath been

Plenarty formerly put the right full Patron on any future avoidance to his right of right, but now by statute it affects only that one turn, and has no effect on any future avoidance.

given

given
was t
jectm
dit; i
oned
like.
raged.

(46)
ed in
issued
person,
Archde
dict I
whethe
within
shop gi
ther in

(46) A
cumbent
parochial
prebends

Induct
about spir
ture, bec
of the te
the Temp
deputy de

(47) It
VOL.

given on the first institution. Its advantage was that it enabled the party to try his title by ejectment, without having recourse to *Qu. Impedit*; its disadvantage, the uncertainty it occasioned to whom tythes should be paid and the like. It has been therefore deservedly discouraged.

OF INDUCTION.

(46) The mandate to induct is usually inserted in the letters of institution, it is usually issued to the Archdeacon yet he rarely inducts in person, but issues a precept to others *within the Archdeaconry* to do it. Hence on a special verdict I suppose in *Qu. Imp.* a question arose whether induction by a person not resident within the Archdeaconry is good? (47) If a Bishop giving mandate dies before induction, whether induction by virtue of that mandate be

(46) After institution the Clerk is not complete Incumbent till induction, and what induction works in parochial cures, is done by instalment into dignities, prebends, &c. &c.

Induction though it is an act of spiritual persons about spiritual matters, yet it is an act of a temporal nature, because it puts the Incumbent in full possession of the temporalities. It is therefore cognizable only in the Temporal Courts, and the Archdeacon or his proper deputy delaying is liable to an action on the case.

(47) It is, Noy 134.

VOL. II.

S S

void,

void, has been made a question, and seems undetermined. However the party may in such case have recourse to the Archbishop, whose mandate, even supposing it not executed until after the confirmation of a new Bishop, is not void but only voidable.

But certainly a Clerk that has received collation and mandate for induction from a Bishop to a living of his own gift, loses the benefit of both, if the Bishop die before the Clerk be actually inducted.

During the time of an Archbishop's inhibition, the Bishop cannot collate a Clerk, but must present him to the Metropolitan, as other Patrons do, who or his Vicar General, are to grant or refuse institution and induction.

Form of Induction. The Inductor is to take the Clerk by the hand, and lay it on the key, or on the ring of the Church door, or if the key cannot be had, or there be no ring, on any part of the wall of the Church or Church-yard, using words to this effect: *I do induct you, by virtue of this mandate, into the real and actual possession of the Church of ——— with all the rights, profits and appurtenances thereto belonging.* The Inductor then opens the door, and puts the person inducted into the Church, who usually tolls a bell,

a bell, to make his induction notorious to the parish. Which done the Inductor certifies the induction, which he may do by indorsement on the mandate. These ceremonies however are not essential. The essential matter is, that that the induction be not made clandestinely (48), that the parishioners and all persons concerned may have notice. Where Church key could not be had, reading the Common Prayer and 39 Articles in Church porch has been held sufficient.

The *effects of induction* are, 1st. That the Parson hereby becomes seized of the temporalities of the Church, so as to have power to grant them, or sue for them. 2dly. He is entitled to plead that he is Parson imparsoned. 3rdly. The Church is full, not only against a common person, (for so it is by institution)

(48) N. B. The method of taking institution or induction to a vicarage, is the same with that by which a Clerk obtains a Rectory. Only the *Vicar* takes an oath of perpetual residence, over and above all that is done by a Rector, and without taking this oath, his institution is null and void. Performing these requisites in such Churches as *remain* in a union, sufficient for all the union by Irish stat. 31 Geo. II. ch. 11.

but also against the King, and the Clerk is compleat incumbent or possessor (49).

Further qualifications after institution and induction.

—Within two months after he shall be in the actual possession of his benefice or promotion, the person inducted is to read the Morning and Evening Prayers, upon some Lord's Day, in the Church, Chapel or place of Publick Worship belonging to his said benefice or promotion, and afterwards *declare* his unfeigned assent and consent to the use of all things therein contained and prescribed, otherwise he shall be deprived ipso facto, so that the Church is presently void without any declaratory sentence, and within three months next following he is to procure a certificate of his having so done and read the same, together with the *declaration* aforesaid, on some Lord's Day, in the parish Church

(49) If the Inductor or person to be inducted be forcibly kept out of the parsonage house by laymen, the writ de vi laica removenda, lies for the Clerk, which is directed out of Chancery to the Sheriff of the County, to remove the force, and if need be to arrest and imprison the persons who make resistance. If any other Clergyman presented by the same Patron doth keep possession, then a spoliation is grantable out of the Spiritual Court; whereby the profits shall be sequestered till the right determined.

where

where
vice, a

In E
Articles
two mo
vation i
take the
juration
otherwis

Ecclesi
nerable
from the
the mor
ty God,
ed them
merly m
the time
the ill u
voured t
exempted
they att
secular ti
that as

where he is to officiate, in time of Divine Service, and this is by the act of uniformity.

In *England* he must by statute, read the 39 Articles, and declare his assent thereto within two months after induction, on pain of deprivation ipso facto. By *statute*, he must there also take the oaths of allegiance, supremacy and abjuration, within six months after his admission, otherwise he is incapable of holding the benefice.

Ecclesiastical Privileges and Duties. This venerable body of men being separate and set apart from the rest of the people in order to attend the more closely to the Service of the Almighty God, have thereupon large privileges allowed them by our municipal laws and had formerly much greater, which were abridged at the time of the Reformation on account of the ill use which the Popish Clergy had endeavoured to make of them; for the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie. But it is observed by Sir E. Coke, that as the overflowing of waters doth many times

times make the river to lose its proper channel, so in times past Ecclesiastical Persons seeking to extend their liberties beyond their true bounds either lost or enjoyed not those which of right belonged to them. The personal exemptions do indeed for the most part continue, but are counter-vailed by disabilities. A Clergyman cannot be compelled to serve on a Jury (50)—nor to appear at a court leet—nor be chosen to any temporal office (51).—During Divine Service he is privileged from arrests in Civil Suits (52).

(50) But if a Layman be summoned on a jury and before the trial takes orders, he must notwithstanding appear and be sworn.

(51) Even though it be an office which he might execute by deputy, and if elected he may have the King's writ for his discharge, 2 Inst. 3.

(52) The immunity from arrest extends to him *cundo* and *redeundo*, but not to breaches of the peace, 12 Co. 100. Cro. Ja. 321.

As to execution against the profits of his benefice, a writ * goes to the Bishop of the diocese, in the nature of a *levari* or *feri facias*, to levy the debt and damage *de bonis Ecclesiasticis*, and thereupon the Bishops sends out a sequestration † of the profits of the Clerk's benefice directed to the Churchwardens to collect the same and pay them to the Plaintiff till the full sum be raised.

* Regist. Orig. 300. Judic. 22 Inst. 4.

† See a precedent, 2 Oughton.

In cases of felony he may have benefit of Clergy without being branded in the hand (53), and may have that benefit more than once—violent hands are not to be laid on him (54)—he is not to

(53) The history and progress of this benefit of Clergy may be found in all legal elementary writers. It stands thus at present: All Clerks in orders are entitled to it, in all felonies from which it is not taken away by Act of Parliament, without burning in the hand or transportation, though the offence be repeated ever so often, but in some cases are liable to imprisonment for a year. All Peers for the first offence without burning, &c. &c. All Commoners on being burnt in the hand, and perhaps besides suffering a discretionary imprisonment, or in case of larceny being transported for seven years. Jews are within it.

Though Clergy be taken away by Act of Parliament from the principal, it doth not without express words take it from the accessory—if taken from the *person* committing the offence, actors and abettors are not excluded; if from the *offence* itself, they are.

(54) Laying violent hands on a Clerk is punishable in the Spiritual Court, by 31 Edw. I. ch. 4. and 9 Edw. II. ch. 3. yet in Cro. El. where a Clerk libelled against an Impugnant who beat him with a bill, and called him by the ridiculous names of Goose and Woodcock, prohibition went; for the Court held that though for laying *violent hands* on a Clerk, the suit ought to be in

an

to be taken by process on statute Merc. or stat. Staple. But on the other hand he cannot sit in the House of Commons (55), and by statute is forbidden to take any lands or tenements to farm, on pain of forfeiting ten pounds per month and total avoidance of the lease (56), nor shall he engage in any manner of trade or merchandize, under forfeiture of treble value; he cannot be an approver, nor bring an appeal for death.

These privileges are confirmed by Magna Charta, by the King's Oath at his Coronation, and by various statutes.

the Spiritual Court, yet for an *assault* only the suit ought to be at Common Law—a distinction rather nice.

(55) So says Mr. Justice Blackstone, and the Journals of the House of Commons, yet Dr. Christian thinks otherwise, and in 1785, in England, an Election Committee allowed a person in Deacons orders to sit. Dr. Christian says, in Ireland the Clergy are excluded from parliament by statute, and quotes Lord Mountmorris' Hist. of Irish Parliament. I cannot find any such statute, there is one indeed against those Proctors sitting in parliament who used to be sent two from every diocese, but I conceive that the principal reason why the Clergy are excluded from parliament is, that attendance there would be totally inconsistent with their religious duties.

(56) Excepting he has not glebe enough for his necessary purposes.

Besides

Besides
(57) are
They are
Ecclesiastical
lay fees.
tenths and
fees where
endowed
that the
issued is
Bishop's
freedom
And free
and custo
the anci
empted
liament,
tute, bu
viz. Tha
Act of
ed (59).

(57) Bu
considered
ties, or o

(58) By
tenths to th
ble that the

(59) Th
in the case

VOL. I

Besides these privileges as to their persons, there (57) are some respecting their estates and interests. They are not to be amerced according to their Ecclesiastical benefices, but according to their lay fees. Distresses for the King's taxes, i. e. the tenths and fifteenths were not to be taken in the fees wherewith Churches in times past have been endowed (58). If it appear on Sheriff's return that the person against whom a writ of execution issued is *clericus beneficiatus*, a writ goes to the Bishop who sequesters the living. They enjoyed freedom from purveyance while it was in force, And freedom by the Common Law, from tolls and customs, from pontage and paviage. And the ancient doctrine was, that they were exempted from tolls even imposed by Act of Parliament, unless expressly mentioned in the statute, but now the contrary doctrine prevails, viz. That Clergymen are liable to all charges by Act of Parliament, unless specially exempted (59).

(57) But some of these boasted privileges have been considered by wise writers, as in fact irksome disabilities, or odious indulgences.

(58) By the *Articuli Cleri*, for as the Clergy paid tenths to the Pope for those old fees, it was not reasonable that they should pay twice.

(59) This was resolved in debate before all the Judges in the case of *Webb v. Batchelor*, 2 Lev. 139.

Duty of a Bishop (60). The function of a Bishop in these countries may be considered as two fold, what belongs to his *order*, and what belongs to his *jurisdiction*. To the Episcopal order belong the ceremonies and duties of confirmation, ordination, and dedication of Churches (61). To the Episcopal jurisdiction, besides the general superintendence of the diocese, the inspection of the lives and manners of the Cler-

(60) The *rank* of Bishops was before considered; the assumed precedence of the Bishop of Rome will appear more surprising when we read this title in his own Canon Law, “*Electio Romanorum Pontificum a Ludovico Imperatore conceditur Romanis.*” Vide *Decreti Primam partem*. Distinc. 63. ch. 30.

(61) Confirmation is directed to be performed by the Bishop once at least in three years, in Ireland by the 17th Canon. As to ordination I must refer to page *ante* 229. The form of dedication or consecration of Churches is left to the Bishop's own discretion; but after the offence taken at Archbishop Laud's famous consecration of St. Catherine's Church, forms were prepared by the convocation, but never received the sanction of Royal Authority. One generally used is found in Burn's Ecclesiastical Law, Vol. I. p. 301. 8vo. On the consecration of Churches, and the anniversary thereof, great feasts were formerly held, and deviated into great abuse,—and hence the origin of *fairs*, which were at first usually held in Church-yards.

gy, the
repair
be kept
all thin
in Eng
once in
diocese
trienial

(62) T
the Arch
tions are
according
(63) T
fusive ac
abridged
to Bishop

Let the
to him
which he
the Univ
certificate
three grav
for the spa
to be orda
old, but
suant to
Minister

gy, the care that they should reside, build or repair the glebe houses, and that their Churches be kept in proper repair, and furnished with all things necessary (for which purpose though in England he is forbidden to visit oftener than once in three years, he in Ireland visits the diocese annually (62), as the Metropolitan does triennially), (63) he is to collate to benefices, to

(62) The reason of this difference is that in England the Archdeacon is to visit annually, Archidiaconal visitations are unknown in Ireland. Annual visitations are according to the Canon Law.

(63) This confined treatise doth not admit a more diffusive account of Episcopal duties, but the following abridged directions on certain heads may be of some use to Bishops newly appointed.

FOR ORDINATION.

Let the Bishop require that the candidate shall signify to him his name and place of abode with the title on which he is to be ordained; also letters testimonial from the University in which he has taken his degree, with a certificate of his good life and conversation, signed by three grave Ministers who have known his behaviour for the space of the three preceding years: if he desires to be ordained a Deacon, he must be twenty-three years old, but if a Priest twenty-four years complete, pursuant to the 31st Canon; his age to be certified by the Minister and Churchwardens where he was born; if

to grant institutions on the presentation of other Patrons, to command induction, to order the collecting

such certificate cannot be obtained, he is to have his age authentically certified in some other sufficient manner. If he applies for Priest's orders, he should exhibit to the Bishop his letters of orders for Deacon. The title upon which he is to be ordained should be according to the tenor of the 30th Canon; if he comes from another diocese he should bring letters dimissory from the Bishop of the diocese whence he comes, according to the 31st Canon, in which letters the age of the Candidate is to be expressed. The forementioned instruments to be transmitted to the Bishop at least ten days before the time of ordination. He is now also by an agreement amongst the Bishops in Ireland to bring a certificate of his having attended a course of Divinity Lectures in the College of Dublin for two years.

FOR INSTITUTION.

The presentation to be tendered to the Bishop and left with him a competent time for his consideration. Letters of orders to be exhibited pursuant to the 33rd Canon.—Testimonials of his former life and good behaviour according to the 33rd Canon, and if he comes out of another diocese, then a testimonial from the Bishop of the diocese from whence he comes, according to the same Canon, to which I will add this direction, that if he has reason to apprehend that the right to the living or turn will be controverted, he may on the ground of asking a competent time to examine the Clerk, or person without it, give convenient time to persons interest-

ed

collecting
benefice

ed to take
be fair and
his Clerk
pay attention
stitute the
all such o

F

The per
nation from
the salary
He must
must bring
comes not
shop's own
monial from
comes from
monial from
comes, pur

FOR

He must
Churchward
appointmen
rised to app
con or Priest
and behavior

collecting and preserving the profits of vacant benefices for the use of the successors, to unite

ed to take knowledge of the avoidance, and it seems to be fair and just : but if the other party doth not present his Clerk but merely enters a caveat, he is not bound to pay attention to it, but after a competent time should institute the person first presented : but for his conduct on all such occasions I must refer to page 290, post.

FOR A LICENCE TO A CURACY.

The person asking the licence should bring a nomination from the Incumbent in which is to be expressed the salary proposed to be given for serving the Curacy. He must exhibit to the Bishop his letters of orders—must bring letters testimonial from his College, or if he comes not immediately from a College and is of the Bishop's own diocese, then to bring a certificate or testimonial from three neighbouring Clergymen ;—if he comes from another diocese, then to bring letters testimonial from the Bishop of the diocese from whence he comes, pursuant to the 38th Canon.

FOR A LICENCE TO A LECTURER.

He must bring a certificate from the Minister and Churchwardens of his having been duly elected, or an appointment under hand and seal from persons authorised to appoint, to exhibit his letters of orders of Deacon or Priest, and to bring testimonials of his sober life and behaviour.

and

and separate parishes as it may be necessary, and to defend the liberties of the Church.

He is also to licence Curates and Schoolmasters, and formerly Physicians and Surgeons also, and he has the important charge of taking care of the probate of wills and granting administrations, and he is also to certify to the Judges touching legitimate or illegitimate births—but of some of these a little more particularly.

If the Bishop finds his Clergy criminal or immoral, he may according to the nature of the offence, suspend, deprive or degrade the offender (64), and where he omitted even the regular process of three citations, a mandamus has been refused to restore the person thus punished. If they refuse or omit to reside, he may after proper monition sequester the benefice, or inflict Ecclesiastical censures, or even proceed to deprive. If an Incumbent having no glebe house refuses to build, the Bishop may sequester his living; so if he neglects to repair (65).

If the Church or Chancel be out of repair, the Bishop may proceed by Spiritual censures against the Incumbent in the latter case, and against the Churchwardens refusing to make a rate, or to cause one to be made, or parishioners refusing to pay it in the former; but the Bishop cannot make

(64) For these punishments, see post page 280, &c. &c.

(65) Vide post page 324.

a rate, nor issue a commission to make it, but should call on the Churchwardens if the Church be not in repair (66); or if it be not furnished with the proper ornaments, books, vessels and utensils.

At visitation the Clergy are to exhibit their letters of orders, and pay their procurations; and the visitatorial power of the Bishop extends to all Spiritual Hospitals, to all free Chapels, Donations, Deaneries, Monasteries of old, unless specially exempted.

The conduct of the Clergy, and the state of their Churches form the most usual subjects of enquiry at visitations, but no certain visitation articles are appointed by Law, and their formation must depend on the good sense of the Bishop, governed by the state of his diocese and the circumstances of the times; how far he might by a summary process in visitation enforce some of the branches of his authority I will not enquire, as is always usual to cite the person accused, on the ground of the information appearing at the visitation, and proceed against him to sentence in the Bishop's Court. It must be observed that

(66) But much of this trouble has been saved to the Bishop in this kingdom by the Irish statute 3 Geo. II. ch. 11. directing the mode of applotting rates, and enabling succeeding Churchwardens to sue their predecessors.

no

no sentence of deposition or deprivation can be pronounced against a Minister but by the Bishop (67), and no person is to exercise Ecclesiastical jurisdiction over a Minister in causes criminal, except he have been admitted into the order of Priesthood (68).

For the form of institution and induction I must refer to a precedent Chapter (69), and to a subsequent one for the conduct of the Bishops and just cautions by him to be used where he receives a presentation from a Lay Patron to a living to which he himself claims a right to collate, or to which some other Lay Patron has claimed, or as he has reason to suppose will claim a right to present (70).

As to his power of uniting and separating parishes I must also refer to a subsequent Chapter where it is expressly treated of, only observing here, that as the former became necessary from the civil wars, poverty of provision,

(67) See 71st Canon, Irish.

(68) By 71st Canon, Irish, yet Laymen, Vicar General and Principal Officials constantly do in Ireland until sentence, save that to excommunicate any person, they always call to their aid some Priest, who pronounces the same.

(69) See ante page 243 and 249.

(70) Vide post page 291, 292, &c. &c.

and

and for
causes
power
the num
The
for the
worthy
into the
Bishop
Cathed
cant P
during
One
proper c
evident
Bisho
thirty y
of the re
being th
and enjo
poral Ba
they can
natum.

(71) TH
not, as I
have been
diocese of

(72) R
Vol.

and scarcity of Protestants in Ireland, so as these causes decrease, it would be well if the latter power were a little more exerted, by encreasing the number of the Clergy (71).

The securing the profits of vacant benefices for the benefit of successors is another power worthy of notice. To do this the living is put into the hands of sequestrators, but whether the Bishop has jurisdiction in matter of profits in his Cathedral, as the intermediate profits of a vacant Prebend, claimed by the other Prebends during the vacancy, was a great question (72).

One of the greatest duties of a Bishop, the proper disposition of preferments in his diocese evidently cannot be regulated by any law.

Bishops, (who at consecration must be fully thirty years of age) are one of the three estates of the realm, the Lords Temporal, and Commons being the other two. They are styled Peers and enjoy the same legal privileges as the Temporal Barons do, trial by Peers excepted, and they can bring an action for scandalum magnatum. The disputes as to their power of vot-

(71) The whole body of the Clergy of Ireland, do not, as I apprehend extend to 1200, a number, as I have been informed, not greater than is found in the diocese of Lincoln alone.

(72) *Rev v. Bishop of Durham*, 1 B. R. 567.

ing in Parliament in cases of life and member are too prolix to be here inserted.

Duties of Clergymen. I proceed to the duties of the inferior Clergy; propriety in general conduct and dress, sobriety in eating and drinking, and continence (73), are enforced by provincial constitutions. Bearing arms forbidden by a constitution of Othobon, from which it appears that some Clergymen used to associate themselves with robbers, a strange picture of those ancient times.

The 42d Canon, Irish, forbids Clergymen to go to taverns except from necessity, or to give themselves to base or servile labour, or to drinking or riot, or to playing at dice, cards, or tables, and is very particular as to dress; but much of the dress which it enjoins or forbids is

(73) The Canon Law requires that a Clerk of ill fame be suspended, till he purge himself. That a vain boaster be suspended *ab officio* and *beneficio*. Deposition was the punishment for fornication.—Suspension for drunkenness. He was to abstain from feasts of too much mirth or jollity, but no specific penalty imposed; striking, if incorrigible, was punished by deposition.

By provincial constitutions Clergy are not to wear long hair, nor habits like those of Soldiers or Laymen; if not reforming in six months from such practices, suspended *ab officio*, and in three months more a *beneficio*, by 1 Edw. III. No Clerks to wear fur, but such as have one hundred pounds a-year in the Church.

NOW

now become obsolete ; it especially directs them to use the accustomed apparel of their degrees.

They are to use the prescript form of Divine Service (74), with decency and reverence ; and must not deviate from the order and form in the book of Common Prayer (75), nor is it safe
or

(74) By Canon 7 and 8 Irish, and by the acts of uniformity.

(75) To stand when they should kneel has been deemed punishable.

And here it may not be irrelative to make some extracts from a tedious but useful book, Bingham's Antiquities, which tend by comparison to illustrate and defend some parts of our modern rights and worship, by comparison with the ancient. First premising, what is pretty generally known that our present morning service consists of three services originally performed at three different hours, viz. the *morning prayer*, the *litany*, and the *communion service*, and this accounts for the repetitions, particularly of the Lord's Prayer.

The ancient worship was divided into two parts,—the *Missa Catechumenorum*, and the *Missa Fidelium*, the service of the Catechumens, and the service of the Communicants, or as we may otherwise term them, the Antecomunion service, and the Communion service. At the former all persons might be present; it included the psalms, the reading of the scriptures, the sermon, and particular prayers over penitents. This being ended, the Deacon desired all the non-communicants to withdraw. The

or adviseable to take any liberties with the forms of Prayer settled for the 5th November, or 30th of

latter Missa contained the prayers to be said at the Altar: The name Missa was then applied to every part of Divine Service, and not confined to the consecrating of the Bread and Wine. Missa comes not as Baronius would have it, from the word Missah, an oblation, but is a Latin word, Missa, from the dismissal of the people.

Liturgies.—In the first ages every Bishop was at liberty to order the form of Divine Service in his own Church. In after ages, the Churches of a whole province conformed to the Liturgy of the Metropolitan Church. When the spirit of Prophecy ceased, the rules of the Church supplied the want, by proper forms of their own composition, according to Christian prudence and discretion. It is objected to this, that none of these remain at this day. Answer, Because each Bishop made his own, and therefore they were little known beyond his own diocese. 2dly. They probably were not committed to writing, for Diocletian found none.

That set forms were used in the Apostle's time, is argued from their complying with the set forms of the Jews. What the set forms of the Jews were, are very particularly described by Dr. Lightfoot, in his book, entitled *Temple Service*.

But besides their compliance with the stated forms of the Jewish liturgy and worship, they had some forms of their own in constant use among themselves:

1st. The Lord's Prayer.

2d.

of January, though they are not appointed by Act of Parliament, as the keeping the days themselves is.

In

2d. The form of Baptism.

3rd. Certain Hymns and Psalms.

4th. The forms of Benediction.

5th. The repetition of the History of Christ's Institution of the Last Supper, as a necessary part of Consecration, which together with the use of the Lord's Prayer, in the celebration of the Eucharist, is generally thought to descend from Apostolical practice.

In the second century the evidence of the use of set forms is chiefly taken from two Heathens, Pliny, a Roman Proconsul in Bythynia, and Lucian. There are numerous testimonies of the like, both Christian and Heathen, in the third and fourth centuries.

It appears from Saint Austin that the Lord's Prayer was used in the Communion Service in his time, and was called the daily prayer; even all the Schismatics used it. Catechumens, or persons unbaptised were debarred the use of this prayer. The Council of Laodicea has two Canons concerning the orarium.

Habits.—The writers of the Romish Church pretend the Apostles themselves wore a sacerdotal habit.

In the beginning of the fourth Century habits certainly were used, for Constantine gave a rich vestment to Macarius, Bishop of Jerusalem, to be worn by him, when he celebrated the service of Baptism. Athanasius laid a tax upon the people to provide vestments. The fourth Canon of Carthage speaks of the alb or surplice.

Gestures :

In the pulpit prayer greater liberties have been taken, and therefore when Sparks was indicted for

Gestures : On the Lord's Day, and the fifty days between Easter and Pentecost, the posture was standing. They knelt on fast days and at the ordinary morning and evenings service on week days, but they stood up to the Minister's collect or prayer. They bowed the head in receiving benedictions and in all direct and formal addresses to God for his mercy and favour on the people. The posture of sitting was never used, though Cardinal Perron holds a contrary opinion. In imitation of the Heathens, some would uncloak and wash; their heads were uncovered, except the womens'; they lifted up their hands to heaven in form of a cross, but were enemies to all theatrical gestures. As they entered they bowed to the Altar. They worshipped towards the East. Because the East was the Symbol of Christ, the place of Paradise, the seat of light and brightness, because Christ made his appearance in the East.

Divine Service was performed in the *vulgar tongue*. This appears from plain testimony, for when Celsus charges the using unintelligible words, Origen answers that each nation prayed in its own tongue. 2d. Because the people joined in the Psalms and prayer and responses. 3rd. From the frequent exhortation of the fathers to the people to hear, read, and pray with understanding. 4th. From the references made by the fathers in their sermons to the prayers and lessons in the service. 5th. From the Scriptures translated into all languages; authority,

for using *other* prayers than those enjoined, the indictment was bad, for it might have been the pulpit

nity, Eusebius. 6th. From the use of interpreters in the Church. 7th. From the Bibles laid in the Churches. 8th. All men allowed to read the Scriptures, even children and Catechumens, and to join in the prayers. 10th. From the form of ordination of Readers in the Church.

Worship was given to God alone.

1st. From their general declarations.

2d. From their denying the worship of Saints and Angels in particular.

3rd. From their charging the practice upon Heretics.

The times of worship: In the time of Justin Martyr, on the Lord's Day only; it should seem not long after, upon Wednesdays and Fridays, which were called stationary days because the assemblies were continued till three o'clock. Saturday was also kept. They had the Vigil and Antelucan service. Assemblies for prayer and preaching were held during the whole forty days of Lent. Chrysostom's Sermons were preached one day after another on continued days: the fifty days between Easter and Whitsuntide were also kept; these were a kind of perpetual festival. In the third century there was morning and evening prayer every day. The Canonical hours of prayer were not known in the three first ages, but introduced by the Monks into the Church in the fourth Century. These were the Matutina which was after day—(the old morning service was before day).

Tertia.

pulpit prayer, and the indictment should have stated that he *omitted* those enjoined, and used others

Tertia, sixth hour or noon, ninth hour or three in the afternoon, Completorium. Psalms and distinct prayers for each of these services. But, as we have a more ample and distinct account of the morning and evening daily service, than of any other stated hours of prayer in the ancient Church, we will proceed to their order of *morning service*: They began with the 63rd Psalm. Next followed the prayers for the Catechumens, Energumens, Competents, and Penitents. Then for the Faithful—the Peace of the World, and the whole State of Christ's Church. Then a short prayer for preservation to the ensuing day. Then the Bishop's thanksgiving. His Benediction. The Deacons dismissing the Assembly. A question is made whether they read the Psalms and Lessons.

Their order of Evening Service.—They began with the evening Psalm or 141. Had the proper prayers for the evening service, and an evening hymn. No doubt read the lessons, and other psalms in some Churches.—The Lord's Prayer was used in Churches daily, as the conclusion of both morning and evening service.

In the *Missa Catechumenorum*, there were other things observable; there was a prayer after the sermon. The Preacher sat—The people stood. The Priest might preach other person's sermons. They preached not more than an hour. They had a custom of clapping the Preacher. Gloria Patri was added at the end of every Psalm

others in
construe
the Act
nalty, a
the Or
A Clerg
not eve
old, per
him do
trine he
the Com
crament
macy, u
ment, v
years pr
the seco
deprivat
motion,
imprison
during l

Psalm in
was cond

In the
might be
They wer
kinds, and

(76) 3

VOL.

others *instead* of them (76), and the statute has been construed not to extend to omissions. Where the Act of Parliament mentions no specific penalty, a Judge may impose reasonable fines, or the Ordinary proceed by Ecclesiastical censures. A Clergyman is not to preach without licence, not even in a free chapel or donative, and of old, persons have been imprisoned for letting him do so (77). He is not to preach what doctrine he pleases, nor any thing derogatory of the Common Prayer, nor against the blessed sacrament, nor in maintenance of the Pope's supremacy, under penalties imposed by Acts of Parliament, viz. for the first offence, forfeiture of a years profits and six months imprisonment---for the second, twelve months imprisonment and deprivation; and if he has no spiritual promotion, the punishment of the first offence is imprisonment for six months, of the second, during life; and a Clergyman has been bound to

Psalms in the Western Church. Over nicety in singing was condemned.

In the *Missa fidelium*, no unleavened bread used; it might be administered to children, and carried home. They were obliged to receive, and received in both kinds, and never sitting.

(76) 3 Mod. 79. (77) Bulstrode 49.

his good behaviour for scandal in the pulpit (78).

The duty of a Deacon is different from that of a Priest. The Deacon may baptise, catechise, preach, *assist* in the administration of the Lord's Supper and do all the other offices in the liturgy which a Priest can do, except consecrating the sacrament and pronouncing the absolution. None but a Priest is capable of holding a benefice or Ecclesiastical promotion, nor can a Layman hold even a donative, so that a Deacon can only use his orders, either as Chaplain to some family, or as Curate to some Priest, or as a Lecturer without a title.

Duty of Residence. The Common Law supposes the Parson resident, so as not to admit in an action of debt a Parson's plea that he was Comorant in another county, 2 Instit. 625 (79).

The provincial constitutions all require residence. One purpose of it was to keep hospitality. Peccham's constitution on this head had a view to his brethren the travelling Friars.

In the Articuli Cleri the Bishops complained of certain excuses being allowed for non-residence, as being in the service of the Exchequer,

(78) 1 Keble 751. Opposition between preachers punished by Canon, 10 Irish.

(79) It was doubted whether *Vicar* were obliged to residence. Therefore he takes an oath.

and

and murmured greatly at the King's answer supporting that exemption.

By Irish statute 36 Hen. VI. ch. 1. beneficed persons must keep residence; in default thereof, one-half of their profits to go to the use of their Churches, the other in expence of wars in defence of the kingdom.

An action for non-residence is given by English statute 21 Hen. VIII. ch. 13. (80) Pluralists not punishable by said statute, if duly resident on any one dignity or benefice; but should be resident at the other at least two months in the year, by the condition usually expressed in faculties. The absence must be voluntary. Bad health—imprisonment—having no parsonage-house, if without fault in the Minister are excuses. An English statute of Eliz. makes the leases of non-residents void. Living in another parish if he serves and attends the cure properly, does not make a lease void, but the Clergyman is punishable if he does not live in the parish, and even if out of the parsonage-house.

All this time the Bishop's (81) regular Episcopal power of enforcing residence is not superseded,

(80) But there is no such act in this kingdom.

(81) No Bishop has ever been more meritorious in enforcing residence than the present justly revered Primate.

no more than his power of enforcing the reading of the Common Prayer is by the acts relating to that duty; and in case of obstinacy, Bishop may punish non-residence, by sequestration Ecclesiastical censures, and even by deprivation.

Inferior Clergy wishing to be absent should get the Bishop's licence, Deans and Bishops that of the Crown.

An Irish statute avoids leases for non-residence (82); the lease is not void *ab initio* but only from the time of the absence.

Baptism, marriage, burial. Baptism may be suspended if the person be not brought to the place of public worship, and to the font there on

(82) Irish, 10 and 11 Ch. I. ch. 2. all and every gifts, grants, alienations, leases, forfeitures, charges and incumbrances imposed or suffered by any Parson, Vicar, or Beneficer of any Benefice whatsoever, having cure of souls, of or on his said Benefice, shall be effectual only as long as he shall be resident, without absence from his Benefice above eighty days. And all covenants, bonds, statutes, recognizances, judgments and other assurances, made for enjoying the profits or hereditaments of such benefices, or of any part thereof, longer than he is so resident, or of resignation, or to force him to be resident, in order to uphold such leases, &c. shall be utterly void in Law. This occasioned a question as to tythe notes; see hereafter, under head *leases*.

some

leading
relating
Bishop
on Ec-
tion.
should
Bishops
on-refi-
tio but

be suf-
e place
ere on

ery gifts,
and in-
, Vicar,
ing cure
tual only
from his
, bonds,
surances,
of such
is so re-
resident,
erly void
e notes :

some

from his
bonds,
insurances,
of such

is so re-
sident,
erly void
e notes,

Whether fees are demandable of a man who had been resident in one parish but chuses to be buried in another, has been made a question and Dr. Gibson thinks they are.

Whether burial be forbidden to debtors, as it was by the Civil Law, was formerly a question, but not now.

Whether Rebels dying after attainder and before execution are to have Christian burial, was

you. You also swear that you are not related either by consanguinity or affinity within the levitical degrees to

and that you know of no legal impediment to prevent a lawful marriage from being celebrated between you and

and that you neither know nor believe that any suit is instituted for the purpose of establishing any marriage or matrimonial contract between you and any woman or between

and any man. So help you God, &c.

The same oath is to be administered to the person who comes on the part of the lady, always taking care to swear such person to the lady's age; and if she is found not to be of age to get such consent as the law requires in that case.

If you entertain any doubts with respect to the gentleman's age, it would be also right to swear him as to his age and if necessary get such consent as the law requires.

found

made a question in 1745, and the better opinion seems that they are.

If the minister refuses or delays to bury, convenient warning being given him, he is to be suspended for three months.

Catechising and *Preaching* (84). These duties are enforced by particular Canons.

By 11th Canon, Irish, Ministers are to catechise every Sunday before evening prayer for half an hour or more. And beneficed Preachers resident on their livings are to preach every Sunday by 9th do.

Our last consideration in this chapter is, how men may cease to be Rectors or Vicars, or even to bear the Ecclesiastical character altogether.

This is not only by death, resignation and the obvious and well known cases of taking another benefice without faculty, or being consecrated to a Bishoprick, but also by the penal modes of suspension, deprivation and degradation. Pluralities shall be considered in the next chapter.

(84) A Lay Judge has observed that by the old Canon Law, preaching was no part of the Minister's office, but only reading the Service and administering the Sacrament, and the Bishop appointed Preachers; 2 Raymond 1205. in *Cobalt v. Newcombe*.

The

The penal modes, and the voluntary one of resignation in this.

Resignation. The Bishop may refuse to accept a resignation, upon sufficient causes, but whether he can without cause assigned, was a question left undetermined in a late celebrated case, (85) in which it was ultimately determined that general bonds of resignation are simoniacal and illegal (86).

Suspension is temporary deprivation, and may be either *ab officio* or *beneficio*, or both. If Clergyman officiates after suspension he may be excommunicated and punished for his irregularity.

Deprivation (87) is an Ecclesiastical censure, whereby a Clergyman is deprived of his Parsonage, Vicarage, or other Ecclesiastical promotion or dignity.

The causes of deprivation are properly determinable by the Ecclesiastical Laws, but because there

(85) Bishop of London *v.* Fytche. See Cunningham's Law of Simony, p. 52.

(86) See in a late case, a determination seemingly different, but the circumstances differ much, 4 Term. Rep. 359.

(87) I here insert a late opinion of a celebrated English Advocate on some queries put to him as to deprivation.

there a
ed to
mon L
proceed
where t
mon L
pecially
any offe
In al
tually p
occur :
for proo
fend an

tion. I h
vious crim
vation, for
to deprive
when a je
I cannot
authorities
particularly
trary impo
any private
offences, n
upon oath
unless the
character,
pation in th
VOL. I

there are generally estates of freehold annexed to them inseparably, the Courts of Common Law do sometimes inspect and regulate the proceedings of the Ecclesiastical Court, and where they proceed against the rules of the Common Law, have frequently prohibited them, especially where such sentence of deprivation for any offence is inflicted by Act of Parliament.

In all causes of deprivation of a person actually possessed of a benefice, these things must occur: A monition or citation, a libel, time for proofs and answers, liberty for council to defend and except, a solemn sentence.

tion. I have no doubt says he that conviction of an obvious crime, such as incest, &c. &c. would justify a deprivation, for although the power of the Ecclesiastical Court to deprive has been questioned in some older cases in times when a jealousy was entertained against the jurisdiction, I cannot think these cases would now be regarded as authorities to obstruct a necessary act of discipline, particularly when opposed by determinations of a contrary import. There is as little doubt that a Bishop or any private person proceeding against an individual for offences, may compel witnesses to attend, and to declare upon oath what they know respecting those offences, unless these witnesses are protected by some privilege of character, as Attornies or the like, or by some participation in the guilt of the crimes charged.

Sentence of deprivation must be pronounced by an Ecclesiastical person, and not by a Layman. Causes of deprivation by the Common Law are want of orders, abilities or age, simony, infidelity, incontinence, perjury, murder, drunkenness, and avarice, and according to my Lord Coke, even dilapidations, but in the last case the punishment never was inflicted.

A person *deposed*, is he who is deprived of his office and benefice, though not solemnly. A person *degraded* is *deprived* of both *solemnly*. *Suspended*, is he who is deprived of one or both of them both for a time, but not for ever.

Degradation is an Ecclesiastical censure, whereby a Clergyman is deprived of his orders (88), and
was

(88) *Precedent of a sentence of Degradation.* "Office v. Shewell, for clandestine solemnization of marriage. John Archbishop of Dublin, in July 1739, with the advice and assistance of Thomas Trotter, Rev. Ch. Whittingham, Archdeacon of Dublin, Espinasse Prebendary of Swords, Fetherstone of Donoghmore, King of Tipper, and John Gill, Vicar of Tallagh; does pronounce, decree, and declare the said Edward Shewell guilty of the crime objected to him in the said articles, and that the said Edward Shewell being a Priest and Deacon be entirely removed, deposed and degraded from, and deprived of the said office of Priest and Deacon, and each of them for the said crimes for ever, and by the authority given
us,

was attended in the Romish Church with great contumelious ceremonies.

Degradation is of two sorts, the one summary by word or sentence only.—The other solemn by divesting the party degraded of those ornaments and rights which are the ensigns of his order or degree—solemnly stripping him of his clerical habit. The first of these is *deposition* properly so called. The proceedings of the Ecclesiastical Tribunals are professedly *pro salute animæ*: nevertheless the Kings pardon is a bar to such prosecutions, but not to those *ad instantiam partis*.

us, do hereby, by and with the advice and consent aforesaid, remove, depose, deprive and degrade him the said Edward Shewell of and from all clerical offices and orders of Priest and Deacon, and do condemn him in the costs made or to be made in this business, on the part and behalf of our Promoter of the office."

The right however of any human authority to annul holy orders once conferred, though a frequent practice in the Romish Church, has been disputed by the theologists in these countries, and though such degraded Clergyman is most severely punishable for exercising any clerical office afterwards, yet if he doth, whether it may not be valid as to third persons has been made a question. A degraded Clergyman marrying two Protestants, or Papist and Protestant, is guilty of a capital offence in Ireland, by 12 Geo. I.

Chapter the Seventh.

OF ECCLESIASTICAL BENEFICES.

BENEFICES or beneficiary grants, though now in common parlance confined to Ecclesiastical preferments, originally extended to lay fees of every kind.

They were either proper or improper. Proper were those granted on condition of a retribution in military services. Ecclesiastical benefices were therefore of the improper kind (1).

I shall not here speak of the distinction of benefices into rectories and vicarages, which we have already discussed under the right of persons, but of their difference as to patronage, or

(1) Consult the famous Padre Paolo's work on benefices, of whom Sir Henry Wotton truly said *Quanto doctior, tanto modestior*.

the method whereby the Clerk is put into possession of them.

They are in this light :

1st. *Presentative* Benefices. For the obtaining of which the Patron must present his Clerk to the Bishop or other Ordinary to be instituted, and the Bishop commands the Archdeacon to induct him.

2nd. *Collative* Benefices are those which are in the gifts of Ordinaries, and within their own jurisdiction ; in which case there needs no presentation, but the Ordinary collates or institutes the Clerk, and sends him to the Archdeacon or other person whose office it is to induct him.

3rd. *Donative* Benefices are those which being exempt from the jurisdiction of the Ordinary, are visitable only by the King, or other secular Patron, who puts his Clerk into possession of the benefice, by virtue of an instrument under his hand and seal, without institution or induction, ---licence or examination by the Ordinary.

The right to present to benefices is commonly called *Advowson*, which word means *Advocatio* taking into protection, and is synonymous to patronage. It is not a right to the corporeal possession of the Church, for that is in the Parson, but a right to give to some other man title to such bodily possession. It is completely

ly an incorporeal hereditament, of which corporeal possession cannot be had, but which properly lies in grant (2) and is conveyable only by grant.

The right of patronage called advowson thus originated; at first the tithes were given to the Clergy in common, then living with the Bishop at their common Church, or Cathedral. Afterwards Lords of manors built Churches on their own demesnes, and appointed the tithes to be paid to the person there officiating, from whence arose division of parishes, and from thence the Lord had of common right a power of nominating the Minister to perform Divine Service in such Church of his own foundation (3).

Advowsons are either appendant or in gross. Lords of manors being originally the only found-

(2) An *Advowson* is assets for payment of debts. The void turn is a chattel except where the Incumbent has also the Advowson.

(3) This original of the *Jus Patronatus* by building and endowing the Church, appears also to be allowed in the Roman Empire, Nov. 56. tit. 12. ch. 2. Nov. 118. ch. 23. It may also come from giving the land on which the Church is built, or endowing it with land. Watson seems to think, however, that the Bishop must consent thus to settle the Advowson.

ers

ers,
Chur
tion,
fession
the f
called
or be
cident
manor
it is
but w
once
manor
vowson
append
nexed
and no

(4) T
rude, th
content t
with ref
of the fi
(5) It
the man
If the A
which it
sented to
Ecclesiast

ers, and of course the only (4) Patrons of Churches, the right of patronage or presentation, so long as it continues annexed to the possession of the manor (as some have done from the foundation of the Church to this day) is called an Advowson appendant, and it will pass, or be conveyed together with the manor, as incident and appurtenant thereto by a grant of the manor only without other grants, and even, as it is said, without the words *cum pertinentiis*: but where the property of the Advowson has once been separated from the property of the manor, by legal conveyance, it is called an Advowson in gross or at large, and never can be appendant any more, but is for the future annexed to the person of its owner or purchaser, and not to any of his manors or lands (5).

(4) This Burn and Gibson do not admit in such latitude, they say only that Bishops on such account were *content* to let the Lords have the nomination of persons, with reservation to themselves of an entire right to judge of the fitness of the person so nominated.

(5) It may be thus separated in three ways. 1st. If the manor be granted excepting the Advowson. 2nd. If the Advowson be granted alone without the thing to which it is appendant. 3rd. If the Advowson be presented to by the Patron, as an Advowson in gross. Ecclesiastical persons cannot grant Advowsons.

To

To whom the right of patronage belongs in certain special cases is worthy of note. If Joint-tenants or Tenants in common vary in their presentation, the Bishop is not bound to admit any of their Clerks.

If Coparceners present, the Bishop is bound to admit the Clerk of the eldest sister first, and so on in turns, and it goes to the Assignee. Before foreclosure, though the Mortgagee be in possession, yet the Mortgagor shall present. A Tenant by curtesy presents. Tenant in dower has the third presentation.

An Advowson cannot pass by livery, or orally, but only by deed or will. The inheritance of the Advowson may be sold or granted while the Church is void, or the avoidance which is to happen next after, but not the void turn itself; and the presentation to the vacant Church doth not pass by the sale of the Advowson but is a thing distinct from it, and if the Advowson itself be purchased during the vacancy, with in-

(6) Where these Patrons vary in presentment, the Church is not properly said to be litigious, so that the Ordinary should be bound at his peril to direct a writ to enquire into the right of patronage, for that writ lieth where men present by several titles, but Joint-tenants present all in one title, and therefore the Ordinary may suffer it to pass if he will into the lapse.

tention

tention
simony
the King
Advowson
as we have
son, it
out being
As the
in an Advowson
that is for
to one
shall happen
veyed by
next avoidance
for a grant
thing (9)
If the
his Heirs
be a charge

(7) In the case of a man in his life, he may purchase the advowson, thereupon, consequent

(8) In the case of a man who can alienate, which it belongs to him

(9) Crispin
Vol. II

tention that a *certain* Clerk be presented, it is simony (7), but the grant of the void turn by the King is good. In a grant from the Crown the Advowson must be particularly expressed, tho' as we have said, in a grant from a private person, it will pass by a grant of the manor without being expressed (8).

As the right of patronage or perpetual interest in an Advowson may pass by the grant of him that is seised thereof, so the right of presenting to one or more avoidances, or to so many as shall happen in a limited time, may be conveyed by the same means, but the grant of a next avoidance of a Church must be by deed, for a grant by word only will operate nothing (9).

If the grant of a next avoidance be to one and his Heirs, yet it shall go to his Executors and be a chattel. And if one be seised of an Ad-

(7) In England, by stat. 12 Ann ch. 12. if a *Clergyman* in his own name or that of any other person purchase the next avoidance, and be presented to or collated thereupon, such presentation or collation and all acts consequent thereon are utterly void.

(8) In Spain and some other countries no Patron can alienate an Advowson but by selling the manor to which it belongs.

(9) *Crisps case*, 3 Cro. 163.

VOL. II.

Z z

vowson

advowson in fee, and the Church doth become void, the void turn is a chattel, and if the Patron dieth before he doth present, the avoidance goes not to his Heir, but to his Executor.

Patronage thus acquired by descent or purchase may be disturbed in various ways.

Disturbance of patronage is an hindrance or obstruction of a Patron in presenting his Clerk to a benefice. It was distinguished at Common Law from usurpation, but by statute, usurpation is now become only a species of disturbance (10).

Disturbers may be the Pseudo Patron, his Clerk, or the Ordinary. Disputes therefore about patronage or advowson may be reduced to two classes, those between two Lay Patrons, and those

(10) *Usurpation.* At Common Law, when a stranger presented a Clerk who was admitted and instituted, the rightful patron lost not only that turn, but also the absolute inheritance of the Advowson, till he recovered it in a writ of Advowson. The statute of Westminster 2. gave a *possessory* action if brought within six months. Statute of 7 Anne ch. 18, * enacted that though the six months were past, and therefore the action under statute of Westminster barred, yet the Patron should lose only that turn. Plenary therefore for six months is still a bar in Qu. Impedit, which is only a *possessory* action.

* In Ireland, 1 Geo. II. ch. 23.

those between a Lay Patron and the Ordinary (11).

Adversions disputed between two Lay Patrons.—

If one of these presents his Clerk to the Bishop, and the Bishop institutes him receiving no intimation from the other to the contrary, the latter has no remedy but by *Quare Impedit*. But if the Bishop has reason to think that it will be disputed, and perhaps suspects or knows that the other has not knowledge even of the avoidance, he may (and it is but reasonable and fair) postpone the Clerk thus presented for further examination, (12) and therefore is not a disturber

1 Inst. 344. it is said that usurpation by *collation* though it works no plenarty against *presenting* yet doth against another *collator*, but Mr. Hargrave in the note thereon seems to consider the statute of Anne as preventing it from now affecting even another *collator*.

(11) We might add perhaps disputes on this head between two Bishops, but such disputes can hardly arise, (unless the limits of their dioceses were disputed, or a question arose whether a parish were a peculiar or not,) except in case of lapse to the Metropolitan and the Ordinary collating notwithstanding, and by the Metropolitan's neglect six months running and plenarty incurred.

(12) By the ancient Canons the Bishop had two months time to enquire and inform himself of the sufficiency and qualities of every Clerk presented to him. Twenty-

disturber by not immediately receiving the Clerk
of

eight days said to be now allowed by the law for that purpose, 1 Roll's Ab. p. 354. Hob. Rep. 317. It having been said that the Ordinary was bound to receive the Clerk of him that comes first, Lord Hobart held the contrary, for as he may take a competent time to examine the sufficiency and fitness of a Clerk, so he may give convenient time to persons interested to take knowledge of the avoidance (even in case of *death* and where notice is to be taken not given, as it must in case of *deprivation*) and to present their Clerks to it.

In 3 Leonard 46. it is said that if the Church becomes void by the death of the Incumbent, in which case the Patron is to take notice at his peril, without any notice given to him by the Ordinary of the Incumbent's death, if the Patron present his Clerk a week before the six months are ended, and the Ordinary refuses the Clerk for inability, because he is unlearned, and the week passes over and so the six months pass before the Patron present another; in such case the Bishop shall have the collation: for it was the Patron's folly that he did not present before, so that the Ordinary might examine him, and if he had been found unfit, that he might present another to the Ordinary within convenient time, and for this a good case is cited of the 14th of H. VII. which had been long debated, and where Ordinary commanded the Clerk to come to him afterwards to be examined because he the Ordinary then had business, and the better opinion

of him
amine
fufe in
disturbe
without
rectly d
ing tim
ledge of
fonable
controve
words of
but he h
to the e
ing for
forth in
ent, (16

nion was,
for he di
return, an
that the
might hav
(15) Ho
(14) Sa
venient tin
(15) 4
(16) Sho
trary opini
Salk. 539.

of him that comes first, (13) but he must examine in a convenient time, and after that refuse in a convenient time, otherwise he is a disturber (14); indeed in my humble opinion, without using any such pretext, he might directly defer it, for the avowed purpose of giving time to all persons interested to take knowledge of the avoidance, where he can shew reasonable ground of suspicion that the title was controvertible, and such seem to me to be the words of Lord Hobart quoted in a note below: but he has this advantage, in referring the refusal to the examination, that he is absolute in refusing for lack of learning (15), and need not set forth in what kind of learning the Clerk is deficient, (16) but he must give notice of his refusal

was, that it was a good plea for the Ordinary, for he did not refuse the Clerk, but the Clerk did not return, and the six months expired, and he collated, and that the Patron did not present early enough that he might have time to examine him.

(15) Hob. 317.

(14) Salk. p. 539. a month has been allowed as convenient time.

(15) 4 Mod. 134.

(16) Shower's Parliamentary Cases 88. where the contrary opinion given in *Hall v. the Bishop of Exeter*, 1 Salk. 539. was done away.

fal

fal if it be for want of learning, but not if it be for crimes, for these are as much in the cognizance of the Patron as of the Bishop.

If the second claimant then, (convenient time being thus given him) doth not present his Clerk, the Bishop must leave him to his Quare Impedit, and institute the Clerk first presented; and if the second claimant merely enters a caveat, without offering his Clerk, it will not do, nor is the Bishop bound to regard the caveat, yet his more prudent and decent mode is to put a rule upon him to withdraw his caveat, or shew cause to the contrary, which if he doth not do, the Bishop may institute the Clerk first presented to him (17).

If the second claimant upon convenient time being given to him, or immediately and as soon
as

(17) In a case which came within my own cognizance in the diocese of Cloyne, a Clerk was presented by the Crown; caveat entered by Mr. P. Rule to withdraw caveat, unless cause. Cause shewn was producing a deed of presentation.

The learned Bishop to whom I had the honour of being Vicar General, agreed with me in opinion that the cause was not sufficient, without actually presenting his Clerk, and that he might notwithstanding institute the Clerk presented by the Crown. This opinion is confirmed

as the other, presents his Clerk, the Bishop need not admit either, but may put it (and it is his safest way) upon one or other of the parties to sue out or demand a *Jus Patronatus* (18), for the Bishop is not bound to sue out a *Jus Patronatus* except at the prayer and cost of one or other of the parties. It is the interest of the parties to demand a *Jus Patronatus*, for if they do not, the Bishop may *let the living lapse*; and if they do, the person succeeding has the advantage of getting possession, though he may be ousted afterwards on a *Quare Impedit*, and the disinterested Bishop can have no objection to granting it, as it secures him from being a disturber.

Advowsons disputed between a Bishop and a Lay

confirmed by Bishop Gibson, p. 778. though Degge had formerly cautioned Bishops to respect such caveats*.

(18) A *Jus Patronatus* is a Commission from the Bishop directed usually to his Chancellor or Vicar General and others of competent learning, who are to summon a Jury of six Clergymen and six Laymen, to enquire into and examine and to certify to him, who is the rightful Patron.

* Mr. Blackstone, indeed says, that institution after a caveat is void by the Ecclesiastical Law, but that a caveat is regarded by the Temporal Courts as a mere nullity. But a Bishop cannot become a disturber, by giving institution without regard to a caveat, as appears by the very authority he quotes in 1 Burn, head *Caveat*.

Patron. Let the Bishop collate as soon as possible. It doth not make a plenarty but it makes him Defendant. Let him not regard a *caveat* which he would between two lay patrons to a certain degree, in whose case he would award a *Jus Patronatus*, but in his own case that is not necessary, for the decision in such a suit is to direct him which of two titles to which he a stranger is valid, but in his own case he knows his own title, and is not supposed to doubt it when he collates.

The Patron should issue a *Ne Admittas* (19) directly, which though it doth not prevent the Bishop

(19) *Ne Admittas.* The nature of it is this: Serving your *Qu. Imp.* on the Bishop prevents a lapse, but doth not prevent him from collating and incumbering the living, and if he collates, though you turn out his Clerk at the last, yet he gets the rents and profits in the meantime, which you may afterwards find it difficult to recover. And where the dispute is between two Lay Patrons, a *Ne Admittas* may be necessary, though *Qu. Imp.* has been brought, for otherwise the Bishop may admit the Clerk of a third person, as in the case of *Lancaster* and *Lowe, Cro. James*, and then that third person thus admitted is not removeable but by a new *Qu. Imp.* against him.

In

Bishop

if he

after h

if his c

Rem

of righ

ment.

1. W

right (

to reco

right (2

In the

before m

ed to me

bered the

Quare

also satis

incumber

and after

Quare

Bishop, in

Imp.

(20) W

right fran

per, or m

see simple.

(21) By

without ei

VOL.

Bishop from collating, and he may disregard it if he pleases, yet makes the Bishop who collates after he receives it, liable to a *Quare Incumbravit*, if his opponent succeeds in his *Quare Impedit*.

Remedies for disturbance of Patronage are, 1st writ of right of Advowson. 2nd. Darrein Presentment. 3rd. *Quare Impedit*.

1. *Writ of right of Advowson*, is a peculiar writ of right (20) framed for this special purpose: it is to recover where the Patron is put to his mere right (21), and in order to such recovery a present-

In the case of *Lord De Clifford v. Webb*, in Ireland, before mentioned, a *Ne Admittas* was served, but seemed to me to come too late, the Bishop having incumbered the Church before.

Quare Incumbravit is to recover the presentation, and also satisfaction in damages for the injury done by incumbering the Church with a Clerk pending the suit, and after the *Ne Admittas* received.

Quare non admittit is to recover damages against the Bishop, in case he does not obey the judgment in *Qu. Imp.*

(20) Writ of right of advowson is a peculiar writ of right framed for this peculiar purpose. The pure, proper, or mere writ of right lies only to recover *lands in fee simple*.

(21) By *mere right* is meant mere right of *property*, without either *possession*, or even the *right of possession*.

tion must be alledged in himself or some of his ancestors which proves him or them to have been once in possession; for a purchaser untill he hath presented, hath no actual seisin whereon to ground a writ of right. This writ is totally disused since the statute (22) enacted that no usurpation should turn the interest of the Patron to a mere right.

2. *Affize of Darrein Presentment*.—This is now totally out of use, but has been a method of remedy so celebrated that it ought to be known, as also the reasons why it is out of use. It lay when a man or *his ancestors* under whom he claims, have presented a clerk to a benefice, who is instituted, and afterwards on the next avoidance a stranger presents a Clerk, and thereby disturbs the real patron, this writ was to enquire who was the last Patron that presented,

(22) In England, 7 Anne ch. 18. in Ireland, 1 Geo. II. ch. 23. If the right of the living be not questioned, but only the Clerk presented is refused for some personal defect or spiritual offence, his proper remedy is *Duplex Querela* so called because it is a complaint both against the Bishop and against the party at whose request justice is delayed. It is sometimes brought also by his Patron, and if he succeeds in it, the superior Spiritual Court can grant institution and induction, for it is a complaint to such superior court.

and

and th
no usu
tron to
the Pa
possession
sented
right t
and to
tation
present
being c
Quare
to Adv
3. Q
commar
his Cler
per per
Clerk)
In th
Plaintiff
at least
(23) Q
to be mai
only posse
sented; t
a presenta

and this before the statute, (which enacted that no usurpation should turn the interest of the Patron to a mere right) was conclusive as between the Patron and a stranger, for till then the full possession of the advowson was in him that presented last. But that statute having given a right to any person to bring a Quare Impedit, and to recover notwithstanding the last presentation by whomsoever made, Assise of Darrein presentment has been disused, not only as not being conclusive, but also as more confined than Quare Impedit, being only applicable to titles to Advowsons by descent.

3. *Quare Impedit*.—The writ of Quare Impedit commands the Bishop, the Pseudo Patron, and his Clerk to permit the Plaintiff to present a proper person (without specifying the particular Clerk) to a vacant Church.

In the proceedings on a Quare Impedit the Plaintiff must set out his title at length, and shew at least one presentation (23) by himself, his
ancestors,

(23) Qu. Im. is a *possessory* action, and therefore not to be maintained without having had a *possession*, and the only possession he can have had, must have been by presenting; the Plaintiff therefore must always declare upon a presentation made by himself or his ancestors, or one

ancestors, or those under whom he claims, and where the Advowson is not in gross, it would be bad pleading to count upon more than one; (24) he must recover by the strength of his own title, and not by the weakness of his adversary's, and he must also shew a disturbance before the action brought.

If Plaintiff fails in making out his title, Defendant if he wants judgment, and not merely to nonsuit, must make out a title himself.

Both Plaintiff and Defendant in Quare Impedit may be *Actors* and either of them have a writ to the Bishop as the right falls out to be. But if the Defendant hath presented his Clerk, and he be admitted, instituted, and inducted before the Qu. Imp. brought, the Defendant then

whose estate he hath, or by the grantee of the next avoidance, or by his lessee for life or years, 3 Salk 293.

(24) That to alledge two presentations is double pleading in Qu. Imp. is a general rule well known, but to this there are exceptions, E. G. if the advowson be in *gross*; so for instance in a declaration in Mallory's Qu. Imp. p. 62 there are two presentments, though it be not in *gross*, but the first is the presentment of a tenant for life (recited merely as conveyance to the substance of his plea,) but under whom it will be observed the Plaintiff makes no title.

hath

hath no cause to have a writ to the Bishop, and consequently the Defendant is no *actor* but merely a defendant, and the possession of his Clerk is a title sufficient if the Plaintiff doth not shew a better; and therefore if the Defendant in his plea doth alledge a title *pro forma*, and that he hath presented by reason thereof, that is sufficient for the present and future time, *if no better title be opposed to it* (25), without alleging any other presentation in himself, or in any from whom he claims: but if the Defendant was out of possession as well as the Plaintiff, he must then make out a good title,, or else he never shall even have a writ to the Bishop to admit his Clerk, and in this case only he is an *Actor* as well as the Plaintiff, and in such case he is to alledge a feisin of the Advowson (as the Plaintiff must) either in himself or in those from whom he claims, which is to be done by alleging a former presentation, that being the only actual feisin of an advowson, and though Plaintiff be nonsuit, yet no writ goes to the Bishop, without a title made by the Defendant.

The Process in Qu. Imp. is by summons, attachment, and distress peremptory; if the op-

(25) But if the Plaintiff makes out a better than mere possession, Defendant, although *he be in possession*, must make out still a better title than the Plaintiff.

position

position arises from the Bishop alone, he only is named in the writ: if from a third person being Patron, the writ should be brought against the Bishop and Clerk as well as against the Patron, because if the Bishop be left out and the suit be not determined till six months are past, he is entitled to present by lapse—and if the Clerk be left out the Patron may recover his right of patronage but not the present turn: if they have no other interest, the usual answer is, the Bishop's that he claims nothing but as ordinary, the Parson's that he is Parson imparsonnee (26).

If

(26) Detail on the pleadings in Qu. Imp. cannot be here expected. In Mallory's Treatise on the Subject, the learning is fully and ably set forth; the few following observations may be of use to beginners. The *declaration* must alledge a presentment in the party or those whose estate he hath; but presentment is not sufficient without seisin or laying the fee simple in some other, and bringing down the advowson to himself—Plaintiff must not desert his own title to controvert Defendant's, and even cannot do so, yet the King may take a traverse upon a traverse, which regularly a common person cannot, nor according to Vaughan in any case, but where the first traverse tendered by the Defendant is not material to the action brought. Where persons present by turns, the Count must be *de medietate advocacionis*, but if they present jointly at the same time, as E. G. coparceners, it must be *de advocacione medietatis*.

Plea.

If
point
clesia
preter
ror ca
recove
presen
Churc
in the
Ren
of his
are, I

Plea.
because
lating
not, if
collate
to pleac
he be a
sentmen
than thi
title) an
to the B
The u
imparson
other ple
same thi
title and

If the Plaintiff succeeds, the Jury besides the point in issue are to enquire, *De plenitudine Ecclesie*; *Ex cujus presentatione*; *an tempus semestre preterit*; *De valore Ecclesie per annum*—a Juror cannot be withdrawn in Qu. Imp. He that recovers recovers the advowson as well as the presentment, and the Incumbent that was in the Church when the writ was brought, if named in the writ, is actually removed.

Remedies given to the Clerk in full possession of his Benefice to recover his dues and rights, are, 1. *Juris Utrum* if the lands were Frank

Plea. The Bishop is usually made a Defendant, not because he is really a disturber, but to prevent his collating *pendente lite*, but whether he be a disturber or not, if he be made a Defendant, and had no right to collate when the writ was brought, it is usual for him to plead that he claims nothing but as Ordinary; and if he be a disturber merely by having instituted on the presentment of another, he cannot well plead any other than this usual plea (for he cannot plead the Patron's title) and then the opponent Patron should pray a writ to the Bishop with a *cesset executio*.

The usual plea of the Incumbent is that he is *Parson imparsonne*, and if the Patron has pleaded properly, any other plea seems unnecessary, for he can only support the same thing; but he has a right to plead his Patron's title and to support it if his Patron will not do so.

Almoigne,

Plea.

Almoigne for he cannot have a writ of right because he has not in him the entire fee and right (27). 2. Writ of Entry, Assize, Ejectment, Debt or Trespass, and all the same possessory remedies, which the owners of Lay property have (28) for the reason is the same.

(27) Since the disabling statute *Juris Utrum* of little use, because the predecessor cannot aliene.

(28) The principal statutes in Ireland concerning *Qu. Imp.* are 10 Ch. I. ch. 6. which enacts that it shall not be affected by the statute of limitations; the propriety of this is obvious. The 6th Geo. I. obviating delays in *Qu. Imp.* but this has *expired*, and the 1 Geo. II. ch. 23, made perpetual by 1 Geo. II. ch. 23, which has been already mentioned as touching usurpations, see ante page 298.

This last statute further enacts that in this action (the only *real* action now in use) there shall be one *essoyn* only, on non appearing *attachment*, and at the return, *the grand distress*—that the Clerk of Patron recovering, his Executors, &c. may bring bill for account of profits from the summons, and recover a *reasonable* value, but is concluded by Defendant's affidavit before Ordinary previous to the suit, of what was bona fide made—that if judgment for Plaintiff on Demurrer be affirmed on error, Defendant shall be accountable for all the profits from the judgment; but during the contest Ordinary may allow to the Defendant serving the cure 60l. a year, or to a licensed Curate 30l. or one third of profits if exceeding that sum.

UNION

The
es is d
us fou

(29)
subject
act was
a Parson
that the
tropolita
unite for
nefice, (
Prebend
sent Inc
ance, wh
mission is
ings, if
them be
them, th
or more
other, th
tinct, an
fourth pa
the yearl
the greater
that the

VOL. I

UNION OF BENEFICES.

The power of uniting or consolidating Churches is derived from the Canon Law, and is with us founded either on statutes (29), or on the common

(29) The progress of the statutes in Ireland upon the subject has been this: In the 10th and 11th Car. I. an act was passed, ch. 2. relative to parishes having both a Parson and Vicar endowed, or more, which enacted that the Bishop of the diocese together with his Metropolitan by writing under their Episcopal seals, may unite for ever such parsonages and vicarages into one benefice, (*save* such of them as are annexed to Deaneries, Prebend or Dignity) but if they are then full, the present Incumbents are to hold as usual till the next avoidance, when the consolidation is to take place. A commission is to issue from the Exchequer to value these livings, if their Patrons were several, and if no one of them be full double in value to any one of the rest of them, the Patrons are to present by turns. If any one or more be less in value than the fourth part of any other, the patronage of such smaller benefices to be extinct, and if any one or more be in yearly value a full fourth part or more of the greatest of them, but under the yearly value of the moiety thereof, the Patron of the greatest benefice is to have two presentations for one that the other or others have. *In other words*, if the

common Law of the Church. By the latter Bishops may with the assent of the Patrons and Incumbents (without asking the consent of the Crown unless where it has the patronage) unite benefices *pro hac vice*, for the reasons which are admitted by the Canon Law to be sufficient, viz. for hospitality,

ratio be less than two to one to present alternately; if greater than four to one, the smaller patronage extinct; all between, two presentations for one.

In the 14th and 15th year of Charles II. an act passed, ch. 16. reciting that in some parts of the kingdom, parishes were so small, five or six lying together within a mile or two, that the parishes were too much burthened with cesses for building and repairing so many Churches, and in others so large that it was difficult for parishioners to repair to their parish Churches, and therefore enacting that during twenty years from thence ensuing, the Chief Governor with the assent of six or more of the Privy Council, the advice and approbation of the Archbishop and Bishop respectively, and consent of Patrons and Incumbents, might unite and divide parishes in perpetuity, and disappropriate benefices where they found too great a number appropriated to any Deanery, Dignity or Prebend, and also unite presentative benefices with cure to dignities without cure*; the patronage to be divided by turns according to value; the King if one of the Patrons, getting the

* The converse is allowed by 10 Geo. I. ch. 6.

hospitality, vicinity, poverty, or want of parishioners; and by such union the two Churches are become one, so that a second benefice may be taken by dispensation within the statute of pluralities. Unions *in future* as well as in present are

first presentation. This power of the Chief Governor and Council, after being continued by another act, viz. 2 Geo. I. ch. 14. was made perpetual by 13 Geo. II. ch. 4.

The act of 2 Geo. I. abovementioned, which continued this power, and was afterwards made perpetual itself, besides expressing the power more specially and extending to the separation or annexation of parts of parishes, (where besides the former requisites the consents of Patrons and Incumbents were given under seal attested by two or more credible witnesses) added some provisions, of which the most material are that such unions, divisions and appropriations shall be enrolled in the Rolls Office of the High Court of Chancery, within six months after the date thereof, otherwise void, and that Parsons and impropiators should now only contribute rateably to the repair of the Chancel or furnishing of a Curate.

The framers of the acts beforementioned were guilty of a very extraordinary omission, which was that of not providing for the case of the death or removal of one of the Incumbents of the parishes to be united before the rest, which case indeed must be universal, unless we

are good, and by the union of two Churches no change is made in the advowsons, that is, not only all rights are reserved to the Patron and Patrons as before, but the nature of the Advowsons, appendant or in gross, continues the same.

By statute Law the Chief Governor of Ireland with the assent of six or more of the Privy Council, approbation of the Diocesan and consent of Patrons and Incumbents, may unite and divide parishes, or parts of parishes *in perpetuum* (saving the rights of all persons interested) in all manner of ways that may be found most ser-

make the strange supposition of their all dying at the same time. This made the act of 9 Geo. II. ch. 12. necessary, which enacted, that in such case, the Patron of the united parish entitled to the first turn shall present or collate to the said united parish, by the name it is to bear; his Clerk to be inducted into the parish then void, by delivery of a sod if there be no Church or ruin therein: and on death or removal of the other Incumbents, the said Clerk shall be the full and lawful Incumbent of said united parish without any new presentation, institution, collation or induction: and if such Clerk die or be removed before the other parts become void, the Patron whose turn it then is may present, and his Clerk shall enjoy in the like manner, and so till the union be compleat.

viceable

viceable to the Church, and contributory to the advancement of true religion; and may also disappropriate benefices from a Deanery, Prebend or dignity, settle them on resident Incumbents, or unite them to parishes to which they are convenient, and unite presentative benefices to sinecure dignities, and *vice versa*: the progress of these statutes has been given in a note [30].

PLURA-

(30) The 14th and 15th of Geo. II. had, as we have seen given a power to disappropriate benefices annexed to Deaneries, Dignities, and Prebends, where too many, after deliberation and examination of witnesses, and to settle them upon resident Incumbents; but no power was given to unite such benefices to other parishes lying convenient to them, to provide for which the statute 21 Geo. II. ch. 8. was made.

The other clauses in these acts relative to unions relate to the *repairs* of the Church of the united parish, to *residence*, to *first fruits*, and are therefore more properly referable to other heads, but we must not omit the provisions in the statutes 11 and 12 Geo. III. ch. 10. and 23 and 24 Geo. III. ch. 49. By the *first* of these Acts all Archbishops and Bishops having been empowered to erect Churches, or Chapels of ease in any parish whose Church was too small or too distant, (the bounds of the districts belonging to them being first set out by Incumbent's consent, and the instrument registered, and enrolled so that the same should be deemed distinct parishes

PLURALITY OF BENEFICES.

It was enacted so long ago as by the Council of Lateran A. D. 1215, and may from thence be considered as an essential rule of the Canon Law, that if any person having a benefice with cure of souls take another like benefice i. e. *with cure*, he shall *ipso Jure* be deprived of the former. This principle adopted into our law (31), made every such benefice *as to the Patron void* (32) by

rishes and perpetual cures; the *latter* enacted, that every Archbishop might with the consent of his Dean and Chapter, and every Bishop with the consent of the Dean or Chapter of his diocese, (or if none, of the major part of the beneficed Clergy thereof) and also of the Archbishop, and Patrons of parishes, under hands and seals, unite parishes appropriate belonging to such Archbishop or Bishop respectively into one perpetual cure, or one or more of such appropriate parishes to any other benefice or benefices contiguous, so as the whole union be not above one hundred pounds a-year.

(31) The Council of Lateran is a general law received in England, and as forceable as an act of parliament; said *per Cur*, in *Stavely v. Ullithorn*, *Hardres' Rep.* 101.

(32) See *Evans and Ayscough*, *Latch* 243.

the

the In
secon
fation
prefer
waitin
tion o
in the
fation
did no
not pr
Clerk
thereof
Thu
Englan
monly
person
being
above
fruits
with cur
in posses
possession
(33) A
though be
(34) A
&c. &c.

the Incumbent's being *instituted* or *collated* to a second (33), unless the parson had a dispensation for so doing, so that the Patron might present a new incumbent to the same, without waiting for either the deprivation or resignation of the former, or any sentence declaratory in the Spiritual Court, and a *subsequent* dispensation would not cure the forfeiture; but if he did not chuse to take advantage of it, he need not present, nor would lapse run, till the first Clerk was actually deprived (34), and notice thereof given to the Patron.

Thus stood matters at Common Law, but in England by statute 21 of H. VIII. ch. 13. commonly called the statute of pluralities, if any person having one benefice with cure of souls being of the yearly value of eighty pounds or above as valued in the King's Books of first fruits and tenths, shall take another benefice with cure of souls and be *instituted and inducted* in possession of the same, immediately after such possession had thereof, the first benefice is not

(33) A dispensation comes too late after institution, though before induction.

(34) And till then he would be entitled to tithes, &c. &c.

only

only void in Law, but in fact also, (35) so that the Patron thereof must present to a living of such value so void within six months, without expecting notice from the ordinary to avoid a lapse.

This statute of pluralities never was enacted in Ireland, and therefore the Law in this Kingdom as to the avoidance of a second benefice, *where no dispensation has been had*, stands as it did in England (36) antecedently to the statute of

(35) These expressions of Watson and other writers, that by the Canon Law the first living was void *de jure* —by the statute, in the cases within it void *de facto*, do not seem to me accurately true. It seems rather that by the Canon Law it was void *de facto* or only voidable at the pleasure of the Patron, by the statute absolutely void *de facto* whether he will or no; so that the expression *de jure* in the former case relates only to *lapse*, where the Patron doth not chuse to take advantage of the Clerk's act, and means that in such case the living is voidable by the Bishop.

(36) In Ireland therefore the first living is void *de jure* only, i. e. the Patron's not presenting in six months occasions no lapse till the Bishop has deprived the Clerk of the first living, and after giving notice to the Patron, and then the six months run from that notice. But if the Patron chuses to take advantage he need not wait for deprivation or any sentence of an Ecclesiastical Court.

pluralities

plural
benefi
son wh
the for
to hold
tion for
which
and to
then ap
one wit
Havi
consider
or dispe
livings.
by the C
a Clerk
as he c
(37) Sa
2. no per
in Englan
Geo. II. c
by the tru
ther living
withstandi
(38) W
English sta
tarily imp
kingdom.
VOL. I

pluralities (37), and in both countries if a third benefice is taken without dispensation by a person who already holds two by dispensation, both the former are void, and therefore if he wishes to hold the last, where he cannot get a dispensation for three (38), his best way is to determine which of the two former he will hold with it, and to make the other void by resignation, and then apply for a dispensation to hold the new one with that which he retains.

Having stated the general rule, we must now consider the exception, which is where a faculty or dispensation is granted to hold plurality of livings. These dispensations in old times and by the Canon Law were under no controul, and a Clerk was allowed to hold as many dignities as he could get, with the Popes dispensation.

(37) Save that by the Irish stat. 17 and 18 Ch. II. ch. 2. no person can hold Ecclesiastical dignity or benefice in England and Ireland at the same time, and by 29 Geo. II. ch. 18. the Incumbent of any living augmented by the trustees of the first fruits, if inducted into another living, loses that augmented, any dispensation notwithstanding.

(38) Which he cannot in the cases excepted in the English statute, nor at all in Ireland by the rules voluntarily imposed on themselves by the Primates in that kingdom.

In England the statute of Pluralities makes the taking a second living avoid the first *de facto*, (so that lapse runs,) if the first be worth 8l. per annum or more in the Kings books; and takes away *in such case* the power of granting dispensations for more than two, and confines even that power to persons qualified according to that act.

By this act, any dispensation to hold a second living, where the first is above the value of eight pounds in the King's books, is void, unless the parson has the *qualifications* (39) mentioned in the

(39) These qualifications are being Chaplain to the King and to others in said act mentioned—being brother or son of a Lord or Knight, a Doctor or Batchelor of Divinity or Law.

Dr. Christian in a note on Bl. Com. book 1st. ch. 11. —is of opinion, that since the reign of Henry VIII. no degree in *Canon Law* can be or has been conferred in England. Such degrees are certainly conferred in the College of Dublin constantly, i. e. *in utroque Jure tam Civili quam Canonico*. * This privilege might introduce a question how far a *mandamus* might be applied for, to *grant* a degree. I find no instance in the books, but from analogy, (as Dr. Bently was allowed to move for a *mandamus* to *restore* him to his degree, and was refused upon no other grounds, than those of denying the legality of such an application), we may argue that it can.

* And the graduates of that College are admitted *ad eundem* in Oxford and Cambridge, and vice versa.

act; and any dispensation to hold more than two, where the first is of such value as above, to any person however qualified is void (40).

This statute of pluralities never was enacted in Ireland but the Irish act commonly called the act of faculties (41), 28 H. VIII. ch. 19. recognises it thus; It says that the English act of pluralities and residence shall not be affected thereby, nor shall any licence be given thereunder to hold more benefices than as limited by said act.

(40) Except the King's Chaplain, as to livings in the King's gift.

(41) *Act of Faculties.* By this act the power of granting dispensations was taken from the Pope, and they were directed to be granted by the Archbishop of Canterbury in manner therein; but the act directed that no former Episcopal power of dispensation by Common Law or custom in Ireland should be done away, and also empowered the King to appoint Commissioners for granting faculties in Ireland, who should have all authority that the Archbishop of Canterbury had thereby, and accordingly the Crown did grant the office of *Faculties* to the Primate of Ireland, April 10. 1622, see ante page 9.

The King's power of granting dispensations is said not to be restrained by this statute, and though very unusual, if I am rightly informed, a royal dispensation was not long since granted to a Northern Clergyman in Ireland to hold three preferments.

The act of faculties in Ireland therefore, with a confusion not unusual in those times, speaks of the English statute of pluralities as if Law in Ireland, although even according to the ancient constructions it was not, Ireland not having been specially mentioned therein.

How far this recognition of it in the Irish act of faculties has made it law in Ireland, I will not take upon me to say, but if it be, the English law as to Non Residence is also established here, and an action could be brought therefor. However this be where benefices are without cure, or with cure if all of them or all but the last are under the value of 8l. in the Kings books, the law in both countries seems to be exactly the same: i. e. the old rule of the Canon Law prevails, and any number of these benefices may be holden with dispensation if it can be obtained (42), but the good sense and piety of the powers enabled to grant dispensations, usually restrains pluralists to two livings in all cases, an union being still considered but as one.

(42) But the Canons require that the person obtaining the dispensation should be a Master of Arts, and the livings not more than thirty miles distant from each other.

Dignities

Di
fices
each
cnlty
and o
each o
taking
Parfo
cure.
Th
statute
benefi
act, f
which
nion e
where
not re

(43)
tions to
a Digni
confessio

(44)
tion of
says that
possessed
without
dently in
only a re

Dignities (43) then and Prebends and Benefices even without cure are incompatible with each other, unless there be a dispensation or faculty, and yet it is held that a benefice with cure and one without (being no dignity) do not void each other, and therefore it has been said that the taking of a prebend doth not make a cession of a Parsonage, for a Prebend is a benefice without cure.

This position, and the exception in the English statute of pluralities of Deaneries, Prebends, and benefices appropriate from the provisions of that act, seem to me to have introduced an opinion which is not unfrequent in Ireland, but in my opinion evidently erroneous, that a Prebend, even where a parish makes part of the corps of it, doth not require a faculty (44).

Another

(43) Dignities as was formerly said are those promotions to which jurisdiction is annexed. A Deanery is a Dignity, because the Dean was wont to take the confessions of the Chapter, and may visit them.

(44) This is not only contrary to the plain implication of the statute 17 and 18 Geo. III. ch. 25. which says that a Dignity, Canonry, or Prebend in a Cathedral, possessed together with a Benefice on 25th Dec. 1777 without dispensation shall not be avoided thereby, (evidently inferring that without such a statute, which has only a *retrospect*, even those within its provisions would have

Another question has been repeatedly agitated in Ireland, viz. whether a *Perpetual cure* require a faculty. I cannot understand upon what principle it should not; it is a benefice with cure of souls, answers to the definition of a benefice in every respect, and though the Curate be only licensed, and not instituted and inducted yet he hath the cure of souls actualiter (45).

The

have been so,) but also to common sense, for where a Prebend by being installed, and getting a written nomination from the Chapter, doth ipso facto become possessed of a living or parish attended with all manner of parochial duties, is he not as much an Incumbent of a benefice with cure of souls, as if he had been instituted and inducted thereto? An individual having a Rectory appropriate and not coming within the description of the statute of pluralities, would require a faculty *. And where a Dean and Chapter appoint a permanent Deputy, though the cure of souls may remain *habitualiter* in them, I think his benefice is not compatible with another without a faculty.

The late Archdeacon of Dublin (Dr. Hastings) told me that he took out a faculty for a chantorship in a Dublin Cathedral, the only duty annexed to which was preaching four times in the year.

(45) In this opinion, which he ventured to give several years ago in the case of the perpetual cure of

* See Colt and Glover v. Bishop of Litchfield, in Hobart's Reports.
following

The legal definition of a benefice extends to any Ecclesiastical dignity, promotion, or spiritual living whatsoever given for *life*, not for years, or at will, and Burn expressly speaks of the living served by a perpetual Curate as being a benefice.

Monkstown, near Dublin, the Author was much staggered by the following which was subsequently given by a great authority.

I think that the livings of *A. B.* "are not vacated by "his acceptance of the Curacy of Monkstown, such a "Curacy not being considered as a Benefice either by "the Canon or Common Law.

"This was so determined in the Court of Arches, in "the year 1777, in a cause of Blundell and Green, in "which Mr. Green, the Rector of a Church in Huntingdonshire was articulated against, as having vacated "his Rectory by being nominated and licenced (for "life) to the Curacy of Hurst in Berkshire, by the "Dean of Salisbury, who is both Appropriator, and "Ordinary. But the Dean of the Arches, the late Sir "George Hay was of opinion that the curacy was not "a legal benefice, the acceptance of which would occasion a cession of the Rectory, and dismissed the suit," W. Wynne 1783.

Notwithstanding this high authority, as the principles upon which it is founded are not given, and the position that a perpetual curacy is not a benefice is in my humble opinion contrary to all definitions of a benefice, I am not convinced, though perhaps I might almost fear to remain of my former opinion, had it not since been backed by some of the most learned and highest authorities in this kingdom.

Chapter

Chapter the Eighth.

OF ECCLESIASTICAL PROPERTY.

IN this Chapter shall be given a sketch, (which it is hoped will be found useful) of the laws in Ireland relative to the glebes belonging to the Clergy, their glebe or manse houses (1), their tythes, (2) their power of leasing (3) their possessions (4), and the interest which they or other persons may have in the Churches or Churchyards of the parishes whereof they are Incumbents, and the obligations of building or repairing (5), or enclosing (6) the same.

(1) Dec. lib. 3. tit. 4. De Clericis non residentibus.

(2) Decretals. lib. 3. tit. 30. De Decimis.

(3) Do. lib. 3. tit. 17. De Locato & conducto.

(4) Sec. 7. Dec. lib. 1. tit. 7. De Bonis Ecclesiasticis alienandis vel non.

(5) See Decretals, lib. 3. tit. 48. De Ecclesiis reparandis & ædificandis.

(6) Dec. lib. 3. tit. 49. De Cæmeteriis, De Sepulchris.

BUILDINGS.

The building of Glebe houses, has always been justly thought a matter of the highest importance, as necessary to enable the Clergy to reside, and consequently contributing to the advancement of true religion, and to the furtherance of the conversion of the Papists of this kingdom.

Hence it becomes the duty of the Clergy to build, and if they should be negligent, the Law has given power to the Bishop or other superior to enforce this duty.

This power in some respects varies, according as the objects of it, are possessed (7). 1st. Of benefices or preferments in the same diocese, which all together make up *one hundred pounds* per Ann. 2dly. Of any one benefice of the value of *one hundred and fifty pounds* per Ann.

One hundred pounds, per Ann.—Every Dean, Archbishop, Dignitary, Prebendary, Rector of

(7) As to Ecclesiastical buildings, I speak almost entirely of the Law of Ireland, where the destruction of Manse-houses in the civil wars made many provisions necessary, which are unknown in England.

one or more rectories (having no vicarage endowed), Curate, or other Ecclesiastical person *having cure of souls*, after he hath been *three* years in possession of such preferment to be computed from the time of his admission, if they singly or jointly, or together with what he has in the diocese make *one hundred pounds* per Ann. and if there be no house thereon fit for his residence, shall build, within a time to be limited by the Bishop, on the glebe land of one of his benefices, if any one of them be endowed with such a portion of glebe as shall to the Diocesan appear convenient for building (8).

One hundred and fifty pounds per Ann.—The obligation to build on persons having any one benefice of the value of one hundred and fifty pounds per Ann. is exactly similar to the case above, except, that it takes place as soon as the Incumbent has been two years in possession; and that it does not extend to Dignitaries, but only to Rectors, Vicars, Curates, or other Ecclesiastical persons; which last general words, by

(8) 31 G. II. ch. 11. However if the benefice whose glebe is fit for building, doth not in value amount to fifty pounds per Ann. the Incumbent is not obliged to build, unless the Trustees of the first fruits assist him with a sum not less than fifty pounds.

the

the rules of legal construction, cannot extend to any person of a superior order to Rectors (9).

To further this good work of building, no incumbent can alien a glebe convenient for building a manse-house, or set, let or demise it, for a term longer than one year (10).

Thus far of obligation to build. Incumbent is also at liberty to make voluntary improvements, and charge his successor in the case and manner herein after mentioned.

We will now consider what is requisite to be done, before a building or improvement is commenced.

Every Archbishop, Bishop, or Ecclesiastical Person, intending to build or improve, must previously give unto the persons empowered to grant certificates to them (11), a writing or memorial subscribed with his hand in the presence of two credible witnesses, setting forth the length, breadth, height, and thickness of the wall of such house or houses as he intends to build, with the number of stories in them or each of them to be contained, together with the situation of the ground on which the same are to

(9) 1 Geo. II. chap. 15.

(10) 10 W. III. chap. 6. sec. 7.

(11) Who these persons are, shall be seen presently.

stand, as also the nature and extent of all other improvements, which he so intends to make (12).

This writing or account must be given in at the least one fortnight before the building is begun (13). And this account if approved of, is to be returned to the person giving it, who then may safely begin his building, or improvement.

Requisites to the building.—Of what quality and kind this building, (if a dwelling-house), is to be, shall be our next enquiry.

It must be of stone and lime, or brick and lime, and timbered in the roof and the floors of such dwelling-house, with oak or fir timber (bog oak excepted) and covered with slate, shingles, or tiles; except livings under one hundred pounds a-year, on which such houses or buildings may be covered with thatch (14).

Penalty on neglect.—If the incumbent neglects to build as aforesaid, the Archbishop or Bishop may sequester one-fourth part of the profits of such benefice (15), for the purposes of building, till a sum not exceeding a year and one-half's

(12) 12 G. I. chap. 10,

(13) 9 G. II. ch. 13.

(14) 12 G. I. ch. 10. and 1 G. II. ch. 15.

(15) The Archbishop must however previously obtain the consent of the Chief Governor, the Bishop that of his metropolitan.

income be received. However this power of sequestration only to be given where the living is of the value of one hundred and fifty pounds per Ann. (16)

Commission of Valuation.—The buildings or improvements being finished, the next care of the incumbent is to obtain a commission of view and valuation.

This is granted upon application, by the chief governor or governors in the case of an Archbishop, of the Archbishop of the province in the case of a Bishop, and by the Bishop of the respective diocese in all other cases, to two or more persons, who are empowered to view and examine the houses and improvements, and to examine witnesses upon oath, as to any article of alleged expenditure; and are then themselves upon oath to return a true, just, and faithful account, and estimate of the said buildings and improvements, according to the best of their skill and knowledge (17).

One or more persons are named in such Commission, to administer the oath to the Commis-

(16) 1 G. II. ch. 15.

(17) 12 G. I. ch. 10. sec. 9th. In what manner they are to estimate, whether by measurement or how otherwise, sometimes occasions a question.

fioners,

sioners, and are empowered so to do, by the 7 G. 3. ch. 9. sec. 3.

Certificate.—The next thing is to obtain a certificate, which upon the return made by the Commissioners appointed to inspect the buildings or improvements now made, is granted by such persons respectively as were empowered to grant such commissions (18). This certificate finally settles and ascertains the sums to be allowed, as really and fairly expended on the work or works (19). This certificate is to contain a true account of the clear yearly value or income of the Archbishoprick, Bishoprick, or Ecclesiastical living, as the same shall be proved to be before such persons respectively who shall grant such certi-

(18) 10 W. III. ch. 6. *Provided* that the Commissioners report that the work, (or so much thereof as shall be finished before the death or removal of the Incumbent undertaking the same) is agreeable to what was contained in the writing which as we mentioned above must necessarily be given in before the work is begun, containing an account of the particulars intended: this *proviso* is by 12 G. I. ch. 10. sec. 7.

(19) But it cannot allow wainscot as improvement, unless the benefice whereunto the house belongs is of the clear yearly value of three hundred pounds per Ann.

ificate

ificate (20); the proof to be made at or before the time of making out such certificate (21).

Two provisions however are made, the one that the yearly value or income is to be computed of that particular Ecclesiastical living only whereon such buildings or improvements are made, unless in the case of a union by act of parliament (22). The other, in favour of Bishops, that where two or more Bishopricks are united, the certificate is to contain the clear yearly value of the united Bishopricks, and though the sums have been laid out on one, they may be charged on all the united Bishopricks (23).

Registry.---These certificates must be entered in the Registry of the diocese, and an exemplification

(20) 12 G. I. ch. 10. sec. 8th.

(21) Query, whether the certificate must not say that the house is fit and convenient, vid. 10 W. III.

(22) 12 Geo. I. ch. 10. sec. 1st. If the building or improvements be on the glebe or mensal lands, belonging to a Dean, Archbishop, Prebendary, or other Dignitary, or on lands belonging to any Benefice, Rectory, or Vicarage united or consolidated to such Dignities the *whole* value of such Dignities and the livings thereto annexed shall be inserted in said certificate and included in the previous valuation by 11 and 12 Geo. III. ch. 17.

(23) 9 G. II. chap. 13. sec. 6.

of

of them under the hand and seal of the Archbishop or Bishop will be evidence, should the party be disabled from obtaining the original, on any trial (24).

Claims against successor.—The certificate being thus registered, gives a complete right to any Archbishop, Bishop, or other Ecclesiastical person, his Executors and Administrators respectively (25), who has made, built, erected, added to, or repaired, any house, out-house, garden, orchard, or any other necessary improvement, on his demesne, glebe, or manor

(24) 10 W. III. ch. 6. sec. 8. the certificates appear to me to be final and conclusive, as to the *income* or *value* of the living, but not as to charging what cannot be legally charged, or is not a fit and proper thing to be charged; E. G. I have known a decoy for wild-fowl charged, which the successor very properly thought neither necessary nor fitting; but the certificate, as to a chapel and the like, (a necessary, at least a most suitable and becoming appendage) is always allowed to be conclusive. The word *income* includes the fines as well as rents received.

Whether the house itself thus built is properly included in the charge on the successor, as it often is, has been argued on both sides by ingenious men.

(25) Note, these necessary words are in 11 and 12 G. III. and 12 G. I. and in 10 W. III. end of sec. 1. tho' oddly omitted in the beginning.

land,

land, or on any other lands in his possession belonging to his See or Church, which have been by it certified in manner abovementioned, to have and receive from his next immediate successor, his Executors or Administrators (26) respectively, if it be built on a new scite since the act commonly called the Primate's act, the *whole* (27) sum or sums really and truly expended and laid out in such building, additions, repairs, and improvements, provided that such sum do not exceed the clear value of two years income of the benefice (28). And such successor having paid the sum so certified as aforesaid, he or his Executors

(26) Note, these words executors or administrators of successor, wanting in 12 G. I. and 11 and 12 G. III.

(27) For this reasonable and just provision, we are indebted to an act, framed under the auspices of the late Primate, the builder or improver having (before the year 1772) been entitled only to three-fourths; but this act is conceived not to extend to new buildings on old scites, nor to houses built before the act passed. These therefore remain as by 12 G. I.

(28) If there be shewn to the Trustees of the first fruits, a certificate under the hand and seal of the Archbishop or Bishop of the diocese respectively, by any incumbent or minister having actual cure of souls, that he has erected upon his glebe, a convenient dwelling-house,

tors or Administrators respectively, shall be entitled to, and receive three-fourths thereof, from his next successor, which successor having paid the three-fourths of the said *first* sum, he or his Executors or Administrators respectively, shall be entitled to, and receive two-thirds thereof, (that is one moiety of the sum first certified) from his next successor, which successor having paid the said moiety of the said first sum, he or his Executors or Administrators shall be entitled to and receive from his next successor one-half thereof, that is one-fourth part of the sum or sums in the first certificate mentioned, so that the whole money first expended is raised out of the profits of the Living, in four successions, by four equal burthens.

These are the sums which are to be recovered, under the act 11 and 12 Geo. III. ch. 17. commonly called the Primate's Act, but it is to be noted, that this act does not extend to any additions or improvements, or repairs to buildings or improvements, which have been for-

house, covered with shingles, slates, or tiles, they have a power to pay him a sum not exceeding one hundred pounds; but this sum must not be included in the certificate containing the charge upon the successor, 8 Geo. I. ch. 12.

merly

merly made (29). With respect to such, therefore the act of 12 Geo. I. ch. 10. sec. 2. must be consulted, which gives a power to improver to receive three-fourths from immediate successor who shall have two-thirds of the sum he paid, i. e. a moiety of the original sum from his successor, and he half of the sum by him paid, i. e. one-fourth of the original sum from his successor: The same act provides, that no sum by virtue of it shall be recovered from successor, greater than one year and an half's income of the living.

What the value of the living is must be proved to the person granting the certificate, by such evidences as may appear to the *grantor* sufficient, E. G. by the Clergyman's books, by his Proctors testimony, &c. and his Judgment thereon is final (30).

No person is deemed a successor, so as to be chargeable by these acts, who dies or is re-

(29) *Quere*, the reference of the word *formerly*. Does it mean before the making of this act? A learned friend of mine, the late Bishop of Cloyne thought not, but only before the making the repairs, i. e. the act extends only to *quite new* buildings, and *new* improvements, and not to *repairs*.

(30) 12 G. I. ch. 10. sec. 1st.

moved within the space of one year, from the death, translation, or removal of the person immediately preceding him (31). One moiety of the money, if due under the old acts before the *Primate's*, is to be paid by the person succeeding who shall be first entitled to a year's profit, at the end of the year computed from the death or removal of his predecessor; the other moiety by two equal half yearly payments within the next year, according to the act of 9 G. II. ch. 13. but the Primate's act ordains, that where the money is due under that act, the first successor having paid to the original builder or improver three fourths, which was all that could be recovered under the former act, shall not be obliged to pay the remaining fourth part of the sum certified, untill the end of two years, to be computed from the time when he became chargeable with the whole sum so certified that is till the (32) end of three years, from the death, removal or translation of predecessor.

(31) 9 G. II. ch. 13. sec. 2nd.

(32) The money then under the old acts is paid thus.

One-half at the end of the first year.

One-fourth at the end of one year and a half.

One-fourth at the end of two years.

Under the Primate's act three-fourths of the whole is paid by the first successor exactly in the same manner, the remaining one-fourth at the end of three years.

The

The person chargeable may die, or be removed, before these periods have elapsed; he consequently not having paid the whole money, with which he was chargeable, doubts arose, whether any sum whatever could be recovered from his successor. It was therefore enacted, by 9 Geo. 2 (33) that if he paid *more* than one fourth, the surplus may be recovered from his successor, it being the intention of these Laws, that no successor should pay out of his own pocket more than one fourth without being reimbursed (34).

I have all along, to prevent repetition, considered repairs under the head of improvements. The Laws hitherto recounted, except the Primate's act, have repairs for their object as much as buildings, with this difference only, that it being difficult, to give in a previous account of the intended repairs of an old house, that obligation has been done away, and it is now sufficient, to give in a fortnight beforehand, a ge-

(33) Ch. 13. sec. 1st.

(34) If the first builder or improver died, or was removed before building or improvement was finished, the provisions of the Primates' Act did not extend to him, as I conceive; and he or his representatives recovered only three fourths of the sum actually expended, but 31 Geo. III ch. 19. has since regulated that case.

*

neral

neral account of the buildings or parts thereof intended to be repaired, and of the sum intended to be laid out in such repairs (35).

The *Primate's Act* does not extend to houses built before the act—nor to repairs of such houses, though repaired since the act, (36), nor to any Houses built since the act, unless on new sites.

The charges abovementioned upon successors for repairs are not invalidated, by changing the site of old houses, and building the new one in

(35) Quere whether it doth to *repairs* of houses built under that act, see note to page 331 ante. We are also to observe, that by the Primate's Act if it be found more commodious, to purchase houses already built on lands and tenements more fit for such building upon than the present glebes, all Ecclesiastical persons, first obtaining the consent of their immediate superiors, i. e. Archbishops of the Chief Governor—Bishops of their metropolitans, and others of their Bishops, may make such purchases; and the purchase money for the same, and the expence of buildings, additions, and repairs, being ascertained, and a certificate granted as in the manner abovementioned (in the case of actual building) shall be repaid by the successors, in the proportions, at the times, and in the manner, as if they had actually built upon their former demesne, glebe, or mensal lands; and certain leases are to be esteemed purchases by 11 and 12 Geo. III. ch. 17.

(36) 17 Geo. II. chap. 8.

another

another place, with the consent and approbation of the respective and immediate superiors of the persons so doing, provided that all demands are released, for building or repairing the other house, which other house need not be kept in repair, nor can any sum be recovered for dilapidations, in neglecting so to do.

The division or union of parishes, subsequent to building or improvement made, does not affect the rights of such builder or improver to recover from his successor [37].

This is the substance of those numerous Statutes (38), which have seemingly perplexed the subject before us, but whose confusion vanishes upon a closer inspection, and investigation. I proceed to the remedies for *dilapidations*, first premising, that the method of recovering the

(37) 15 G. II. ch. 5. and 11 and 12 G. III. c. 17.

(38) 7 G. III. ch. 9. sec. 2. All which have grown up, since the ninth year of William the Third, before which time, every Ecclesiastical person, was obliged to leave for his successor buildings in good and sufficient repair, and had no right to charge him any sum whatsoever for so doing, and such is the law still in England, but by a late act 17 Geo. III. ch. 53. Incumbent may mortgage the revenue of his living for a sum not exceeding two years value, to be laid out in building, repairs, or purchase.

sums chargeable upon a successor, by the party who ought to receive the same, his Executors or Administrators, is by distress on any of the lands or tenements of the Archbishoprick, Bishoprick, Living, or Benefice, belonging to the successor obliged to pay the same, or 2ly by sequestration of one moiety of the rents or profits of such See or Benefice, (which sequestration is to be made and granted by the Chief Governor or Governors for the time being in case of an Archbishop, and by the Archbishop of the province in case of a Bishop, and by the Bishop of the diocese in all other cases, who are required, by Law, to make and grant the same,) or 3ly by action of debt, in any of his Majesty's Courts of Record.

The party suing has his election among these three remedies (39).

(39) 10 W. III. chap. 6. sect. 1. I have omitted one observation in its proper place, which must be mentioned, before the subject be closed; it is, that it has been held that paper and painting may be charged, if these included the whole doth not exceed two year's income, and that expensive chimney-pieces and the like are not fixtures, any more than in the case of any other tenant for life. I give no opinion.

DILAPI-

It may justly be supposed that by the power of sequestration of a living, for this purpose of building, or any other, is meant a power of sequestering a *due* portion of the living, sometimes a fifth, sometimes even a moiety, at the discretion of the Bishop, in general by the building statutes in this country one fourth, leaving some reasonable maintenance to the incumbent (40).

DILAPI-

If an incumbent, says Burn, fixes hangings, grates, iron backs to chimnies, and such like for his own convenience, (and they have not gone from successor to successor) they shall be deemed as furniture, and go to his executor, vol. 4. 245. 8vo.

(40) I shall here subjoin two cases of less importance on the building statutes. The Bishop of Ferns was to pay the executors of Cope for a See-house. He disputed the mode of charging before the Archbishop of Dublin, who admitted council to argue it. It was upon that occasion determined that *finēs* and even *procurations* make part of income. The fines I suppose to be taken on an average.

Mr. Lawless presented a memorial for new *offices* on a new site under the Primate's Act, and for *repairs* under the old acts, united in one; he died before the repairs were finished. Very considerable difficulties arose as to granting a certificate on this mixed memorial, but they seem to have been since done away, by 25 and 31 of Geo. III.

I shall also add here another mode of expression of the sum and times of payment under the Primate's Act, and that

DILAPIDATIONS.

The expediency of an incumbent's residing on his benefice is obvious, and to enable him to reside he should have a house in the parish, which must be provided and kept up out of the profits of

that of 31 Geo. III. which perhaps to some persons may appear plainer than what I have given above. Any original builder, or successor who finishes on a *new site*, may recover from his immediate successor, in the first case, the whole of what he expended; in the latter, of what he expended and of what he paid to his predecessor, not exceeding two years income. This last successor to be reimbursed by his, three-fourths, his two-fourths, his one-fourth of said aggregate. *The times of payment*, that first successor pays three-eighths of the whole sum certified, at the end of the first year after he is chargeable; three-eighths more by two half yearly payments within the second year, and the remaining one-fourth at the end of the third year. The other successors to pay half the sum charged on them at the end of the first year; and the remainder by two equal half yearly payments within the next year.

Original builder or successor who finishes on an *old site*, recovers three-fourths, not exceeding one year and an half's income, his successor two fourths, his one fourth; by payments, half at the end of first year after chargeable, the rest half yearly in the next year.

Builder or improver on any *site*, dying or removed before it be finished, to get certificate for no more than the difference between what he would have been entitled

of the
do it.
The
careful,
vide for
Anci
temp. F
of the l
rapaciou
other b
them, a
rebuild t
rebuild
houses a
they sha
to do by
neglect i
take care
Clergyma
the profit
for such r
the Bisho
directs, t
leaving t
dled to if fi
ed in finish
(41) The
the law of
prefixed to

of the benefice, for there is no other fund to do it.

The law therefore has at all times been very careful, both to prevent dilapidations, and to provide for their repair when they have happened.

Ancient Ecclesiastical constitutions therefore temp. Hen. III. (which became the settled law of the land) (41) observing that interested and rapacious Clergymen, when their houses and other buildings were unsound did not repair them, and when they were demolished did not rebuild them, ordained that all Clergymen should rebuild or repair in a becoming manner the houses and other buildings of their benefices as they shall want it; and if being admonished so to do by their Bishop or Archdeacon, they shall neglect it for two months, then the Bishop shall take care to have it done at the expence of such Clergyman, causing so much to be taken out of the profits of the benefice, as shall be sufficient for such repair or rebuilding at the discretion of the Bishop. *Another constitution* in the same reign directs, that if a Rector or Vicar endowed dies leaving the houses destroyed or overthrown or decayed to if finished, and the sum necessary to be expended in finishing, agreeably to the memorial.

(41) The provincial and legatine constitutions became the law of the land in the manner mentioned in a note prefixed to this second volume.

ruinous, a sufficient portion of his goods shall be deducted for such repairs, and this shall be paid before legacies. And from Lyndwood on a constitution temp. Edw. III. it appears, that buildings destroyed, ruinous, or otherwise *totally taken away* shall be estimated, and the whole estimation laid out in repairs by the Bishop's direction. And by the general law of the Church, every Bishop as soon as installed, and Rector or Vicar as soon as inducted, ought to procure workmen skilled in building to view and estimate the dilapidations, and then may commence his suit for dilapidations in the Ecclesiastical Court, two witnesses being necessary to each kind of work.

Thus the law stands still in England, and thus it stood in Ireland until after the revolution, the Clergyman being compellable by sequestration to *repair* or *rebuild*, and enabled to sue his predecessor—his Executors, &c. &c. for dilapidations. In Ireland, the statute 10 Wm. ch. 6. on account of the particular circumstances of the country, and the destruction of houses in this kingdom by the civil wars and rebellion, instead of obliging the present Incumbent *always* to look back to his predecessor, (who possibly had been ruined, and his habitation destroyed while the course of Justice was interrupted) empowered

powered
cessors a
occasion
however
tutes in
give a re
really app
according
where th
remedy a
insolvency

(42) Suc
friend of m
contended t
serve to illu
house in a
almost com
same time
predecessor,
seventy-four
He obtained
examine the
10. and 7 G
tion of these
that the Co
return all dil
pened previo

powered him to throw upon three ensuing successors a burthen which had been unavoidably occasioned by dreadful public calamity. But however this and the subsequent building statutes in Ireland may be generally understood to give a remedy in all cases against successors, they really appear to me to do so in conscience and according to the real meaning of the laws, only where the present Incumbent is deprived of a remedy against his predecessor's family, by their insolvency, or by public calamities (42). I admit

(42) Such was the opinion also of a very ingenious friend of mine, the late Dean of Cork. (Erskine) who contended this point very strongly, and the example will serve to illustrate the theory. He found the Deanery-house in a state nearly unfit for habitation, and which almost compelled him to build a new house, and at the same time was charged by a certificate obtained by his predecessor, with no less a sum than one thousand and seventy-four pounds for repairs of this ruinous house. He obtained a commission from the Bishop to view and examine the dilapidations therein, under 12 Geo. I. ch. 10. and 7 Geo. III. ch. 9. and insisted (under a construction of these acts which shall be mentioned presently) that the Commissioners were authorised and obliged to return all dilapidations whatsoever, *whenever* they happened previous to the Predecessor's quitting, and to whatsoever

mit that whenever the building is not fit and convenient for the Incumbent's residence, the
Bishop

whatsoever amount, although more than the sum certified, or even if there was no certificate, for that they were not confined by the last act to *deducting* them from the sum in any certificate.

As to the objection that it is unreasonable that an Incumbent should get a good house without paying for it, it was answered, no more than that he should get a good living, the house being part of the living; and as to Predecessor having before laid out much in repair, it is evident he did not lay out enough, and as to his only being obliged to keep it in tenantable repair, these words are loose and undeterminate, and the case of landlord and tenant is totally different: the landlord has a permanent interest, and receives a certain compensation in his rent, not only for the use of the house, but also for the decays of it: an Incumbent has an estate and interest in his benefice only during his life or incumbency, and that subject to the duties the law requires, not only residence, and performance of Sacred Offices, but also of keeping up his house, &c. &c.

That as to the most plausible and material objection, that the last Incumbent was only to execute small repairs, and not those great and expensive, and that *allowance must be made for the natural decay of time*, as otherwise it would be requiring an impossibility from an Incumbent, to wit, to confer perpetuity on matter, unless he would build a new house for his successor, it was answered,

Bishop n
speaking

swered, tha
ed;—that
repair or
from any
totally tak
tion, as c
only requi
made goo
feasibility
building)
happily m
have done
quire repa
time some
a wall, &
the whole
all must be
ver happ
done? The
pence? O
ought to
year (as th
done) and
dition; or
who have
but may be
is still the

Bishop may compel him to build, but I am speaking of his remedy and the fund from whence

favoured, that both these objections were equally ill founded;—that the laws comprehend every degree of disrepair or dilapidation from the smallest to the greatest, from any decay to absolute ruin, and the house being totally taken away; and this infers no such contradiction, as conferring perpetuity on perishable matter, but only requires that what is perished should be replaced or made good, or an equivalent given for it. Besides the feasibility of supporting a house for ages (without rebuilding) by repairs from time to time is manifest, for happily many a country gentleman and his ancestors have done it. A house well looked after doth not require repairs in all parts at the same time. At one time some rafters, at another some boards, a chimney, a wall, &c. is repaired as decay occurs; but supposing the whole premises to be in such a condition that all must be repaired or rebuilt at once, (which can never happen but through gross neglect) what is to be done? *The house must be kept up for ever*,—at whose expence? Of those who have received the profits, who ought to have repaired it little by little, from year to year (as the law requires that annual repairs should be done) and by whose neglect it is fallen into this condition; or of those who have been guilty of no neglect, who have received no profits, who possibly never may, but may be out of pocket by the preferment. And this is still the case though a certificate be granted, only it lays

whence the expence of the building is to come; and surely at furthest it is not rational, that the successor should be charged with more than the difference between the expence of the new house and the sum recovered for the dilapidations from the predecessor, and this appears to be the real meaning of the law; to prove what is here said, it must be observed that this very act of W. III. gives a special remedy for dilapidations or suit in the Ecclesiastical Court, or by action of debt, whenever the predecessor has no such public calamity to plead, the sum recovered to be laid out in building or repairing within six months.

The method of estimating these dilapidations under said act of William the Third was left to the

lays the burthen on four innocent successors instead of one. In fine, such a doctrine is directly contrary to the express words and obvious meaning of the sixth section of the statute 10 W. III. ch. 6.

This reasoning did not prevail with the Commissioners in this instance, but in a later case between the Rev. Mr. Burke and the then Bishop of Ossory, the best opinions in Ireland agreed with these sentiments, viz. that though the house be uninhabitable, and it becomes absolutely necessary to build a new one, yet that the Predecessor is liable for dilapidations to the value of the old house, and it is his laches if he doth not sue *his* Predecessor.

same

same as
as is ab
ch. 10.
shops to
quire int
tain wha

The
where th
suffers d
other ext
chargeab
his imme
so allowe
out of th
by the *ff*
to all ca

(43) It v
Cork insiste
ed under t
and authori
happened
whatsoever
tified, or e
Even if
sion could
conceive th

VOL. II.

same as by the common law of the Church, and as is above described. But the acts of 12 G. I. ch. 10. and 7 Geo. III. ch. 9. have enabled Bishops to grant a commission by statute to enquire into dilapidations, and thereupon to ascertain what shall be paid for them.

The first act extends this no further than where the person who obtained the certificate suffers dilapidations; the fourth section of the other extends it to all cases, where a successor is chargeable on certificate (whether obtained by his immediate predecessor or not), and the sums so allowed under these two are to be deducted out of the sums payable by the successor: but by the *fifth* section of said last act it is extended to *all cases whatsoever* (43), where any Ecclesiastical

(43) It was under this clause that the late Dean of Cork insisted, as I have said, that by a commission granted under these two acts, the Commissioners are obliged and authorised to return all dilapidations whensoever they happened previous to the Predecessors' quitting, and to whatsoever amount, although more than the sum certified, or even if there was no certificate.

Even if this were not the case, and that a commission could not be granted for so extensive a purpose, I conceive that by the old law of the Church, the Bishop

fiastical person suffers dilapidations; and the sums ascertained to be paid are not confined to be deducted out of the sums in the certificate, but the Bishop is to enforce payment of them in such manner as by the laws now in being sums adjudged to be paid or allowed for dilapidations are recoverable.

OF TITHES.

Whether tithes be the most advantageous and politic mode of paying the Clergy, it is not my business here to enquire—it is the office of statesmen to judge. To depart from a mode established by the wisdom of ages, is always a matter of weighty moment, nor did I ever hear any scheme mentioned which seemed to me to promise the same permanency to the interests of the Clergy.

The cry however is loud (44), erroneously
I think

or Rector might get workmen to examine and estimate all dilapidations, and thereupon bring his suit as above.

(44) The customs of Ireland, (where almost every man lives beyond his income) have from time immemorial induced a demand of rent greater than political œconomy justifies, because really not leaving to the terretenant a rational proportion of the fruits of the ground;

I think as to the law itself, in general most unfounded (I am convinced) against its execution. I speak from much knowledge and observation in Ireland, when I say, that in infinitely the greater number

ground; and from the same source, land jobbing and encouragement to bid over the heads of each other prevailed among the middle men, while the cottager or lowest order was obliged to take ground at any price, because from the want of trade and manufactures, land was almost the only commodity in the market. The immediate terretenant therefore complained of the gentleman, and the gentleman said it was all owing to the Clergy, and thus both parties were induced to join in throwing all odium upon a distinct order of persons, the Clergy. This state of things was beginning rapidly to mend. Ireland was rising in prosperity, the landlords in many instances were wise enough to set *directly* to the *cotter*, (who paid much less, while they got much more) and their example was spreading, when the fatal introduction of the infernal pest of French politics, added to some errors in policy, covered the country with calamity, raised her debt in two or three years from two millions to twenty, and the expence of her army establishment from half a million to four, and threw her back half a century.

The general objection to tithe is its obstruction to improvement—says the tenant let me improve as I may, my rent doth not increase, but my tithe does. Now without arguing how far this is true of perpetual leases,

number of instances the Clergy are oppressed not oppressing. Custom has forbidden them to demand more than a small part of what they are legally entitled to, and that comparatively small proportion, they often get with prodigious difficulty, and intolerable vexation (45).

The

in leases for years, though advantage is not taken of the improvements every year, yet it is in a lump at the expiration of the lease. The most plausible plans of commutation which I have heard, are those of collection like the county cess, and of a rent charge proportioned to the landlords rent, yet great objections to each must occur.

(45) In the years 1787—88 and 89, I had a particular opportunity of knowing and seeing the treatment of the Clergy in Munster. Whatever few special instances may have been industriously adduced, the tithes in general were extremely moderate.

The difficulties put in the way of the Clergyman were innumerable: he got notice from the parishioners of a whole parish, to draw on the same day and hour: if his pocket was even equal to the expence of hiring such a number of cars, no one would let them to him. If even that difficulty was got over, probably he found a deep trench cut across the road impassable to his carts, while with every notice that invited him to draw, he received a threatening letter menacing his servants with blows or death, which in the event frequently proved not an empty threat.

The Clergyman too was often ignorant of his rights.

The

The
the right

The cor
tithe wit
coming
bad and
by settin
another,
to be illeg
determin
opinions,
dence of

The Cl
statute 29
agreement
ture of fir
two Justic
der mont
writing or
cure com
riages inte
know statu
without be
use force
nation or
makes vol
tithes, or
him, punish
punishmen

The origin of tithes is a speculative question, the right founded in the laws of the land is unquestioned.

The corn was set up in stack before he came for his tithe without any opportunity to view or value—after coming two or three miles, he was told the day was bad and the stack could not be opened,—he was harassed by setting out a very small portion one day, another another,—all which modes every man ought to know to be illegal; and the Ecclesiastical Courts most sensibly determined, and were supported by the most able legal opinions, that universal notice on one day is plain evidence of combination and subtraction.

The Clergy ought also to be well acquainted with the statute 29 Geo. II. ch. 12. which punishes bonds or agreements to obstruct the owner of tithes, with forfeiture of five pounds for each offence recoverable before two Justices, and for want of distress with three calendar months imprisonment, or hard labour: and so also writing or sending menacing letters, to terrify or to procure combination—so also destroying or disabling carriages intended for the drawing of tithe—and they should know statute 27 Geo. III. ch. 15. which makes it felony without benefit of Clergy to inflict or threaten pains, or use force or destroy property, in order to induce combination or prevent collection of lawful rate or tax, and makes voluntary combination to defraud Clergymen of tithes, or obstruct him, or prevent persons employed by him, punishable by fine, imprisonment or other corporal punishment at the court's direction, but prosecution to be

questioned. The Parson has as firm a right to them as the landlord to his land. The land is purchased subject to them, and the price abated accordingly; they are not part of the purchase, and therefore the landlord has no right to complain as if they were a deduction from him, and as to the tenant, the increased rent on land exempted from tithe shews how miserably he is deceived when he thinks their abolition would benefit him.

A treatise on tithes would naturally divide itself into the enquiries,—to whom they are due—what things are tithable----of modus, compositions, or exemptions---and how tithes are to be recovered. The three first questions have been so fully discussed by numerous writers that to say any thing upon them would be su-

be commenced within one year after the offence, and this act is continued to 24th of June 1800.

Besides these, *compensation* acts have been passed more than once with special remedies to recover tithes that have been withheld, and one in the course of the last session, 1799.

They ought also to know that persons *taking a crop*, not *renting* the ground, are not *terretenants*, and that the person who holds the land is to pay; for evasions have frequently been attempted in this way.

perfluous;

perfluous
cularly

(46) I
servation
tithable:
increase by
by custom
attention
country g
assembly t
cause they
leigh; as I
ment of ti
tion, i. e.
ty years,
ignorance
or tin, or
scarcely a
lead, and
have nothi

As to
in Ireland
in the mo
how. It i
Commons,
which eve
that time
ture, now
of the aral

perfluous ; to the laws relative to the last, particularly in Ireland, I mean to confine myself (46).

Tithes

(46) I shall however in this note just make one observation upon the second head, *i. e.* what things are tithable : *Every thing is tithable which doth yield an annual increase by the act of God*, and many things are tithable by custom, which do not bear such annual increase. Inattention to the first principle has made a self sapient country gentleman in my hearing insist before a public assembly that potatoes were not tithable in Ireland, because they were introduced so late as by Sir Walter Raleigh; as I have heard another wise man insist that non-payment of tithes in a parish for twenty years made an exemption, *i. e.* because they had cheated the Parson for twenty years, they had a right to cheat him for ever. And ignorance of the latter have made men deny that turf, or tin, or lead was tithable by custom, where there was scarcely any thing in the parish but turf, or tin, or lead, and without such custom the Parson literally would have nothing to live on.

As to the tithe of agistment in Ireland, the Clergy in Ireland have been deprived of it since the year 1735, in the most unaccountable manner, and nobody can tell how. It is said to be by a resolution of the House of Commons, which I have given in the appendix, but which every body knows could not alter the law; at that time Ireland was almost entirely devoted to pasture, now it is a great granary of corn, and the holders of the arable land complain of this inequality, yet the
sutor

Tithes are divided into *Prædial* as of corn, grass, hops and wood. *Mixed* as of wool, milk, pigs, natural productions but nurtured by the care of man. *Personal*, as of manual occupations, fisheries, &c. &c.

A more usual division is into *great*, as corn, hay, and wood, and *small* as prædial tithes of other kinds, and those called personal or mixed. Custom may turn a great to a small tithe and give it to the Vicar, but the division depends upon quality not quantity, and therefore potatoes, though in great quantities in common fields, were determined to be small tithes and belonging to the Vicar, in *Smith v. Wyat*, 2 Atkins 364.

With respect to all the kinds of tithe in general it became necessary at the period of the reformation to make provision by a particular act, and accordingly in Ireland by statute 33 Hen. VIII. ch. 12, it was enacted that all lawful and accustomed tithes of corn, hay and pasturage, and other sorts of tithes and oblations, commonly due, shall be truly and effectually set out or suitor for agistment would be thought almost insane. Under the pretence of barren land bills still greater exemptions were intended. The opposition of the Clergy to them was not to the principle, but to the perversion. For these and the resolutions on agistment see the Appendix.

paid,

paid, a
place; a
traction
or other
rily or f
Ecclesiastical
pealed fr
payment
Laws E
sentence
after sen
clerical
furesies f
that the
was to be

Thus f
or two c
two Just
ch. 25. a

(47) By
charged of
Hence land

Tithes an
Spiritual C
spoken of,
thority of t
quer, until

(48) Thi
VOL. I

paid, according to the usage of the parish or place; a layman or Ecclesiastic may sue for subtraction before the Ordinary, his Commissary, or other lawful Judge, who shall proceed *ordinarily* or *summarily* according to the course of the Ecclesiastical laws and give sentence, and if appealed from, adjudge costs forthwith, and enforce payment by compulsory process or censures of the Laws Ecclesiastical, taking security to restore if sentence reversed; and on refusal to pay tithes after sentence, on certificate thereof by the Ecclesiastical Judge, two Justices to commit, till sureties found (47), and this act expressly said that the *remedy for refusing to set out, or pay tithe was to be in the Spiritual Court only.*

Thus stood the Law with the exception of one or two cases in which jurisdiction was given to two Justices, until the statutes of 3 Geo. III. ch. 25. and 7 Geo. III. ch. 21. (48) the former

(47) By 33 Henry VIII. ch. 5. Abbey lands, if discharged of tithes before the dissolution continue so. Hence land tithe free, &c.

Tithes are recoverable primarily and principally in the Spiritual Court, which mode shall therefore be first spoken of, reserving the aids to be derived from the authority of two justices, and from the Court of Exchequer, until afterwards.

(48) This is often called the 8th of Geo. III.

VOL. II.

3 H

of

of which having expired, it is only necessary to consider the latter, which as to the tithes therein mentioned is now the great and principal guide to the Clergy in the recovery of them.

This act in its two first sections relates only to the owners of corn, hay, pease or beans, (except in gardens) and to giving notice of setting out tithe, which they are obliged to do 48 hours before, to the person entitled, his Proctor or Manager, or if neither of them can be found at his house or usual place of abode, to some person at such house above 16; but if neither reside in the parish or union, 48 hours notice posted on the Church door, and kept there from ten to one is sufficient (49).

In its third and fourth sections it speaks of all suits for subtraction of prædial tithes, and enacts that all such suits shall be *summary*, and in the third particularly declares that it *shall be sufficient for every Ecclesiastical Person, or Lay (50) Impropiator,*

(49) By the Common Law no notice is necessary, by the Ecclesiastical Law it is necessary. No statute, I apprehend, has been made requiring it in England, (though it was there always necessary previous to bringing an action against Incumbent for not carrying the tithes away), but a custom of giving such notice is a good custom. *Butter v. Heathby*, Burrow's Rep. 1891.

(50) This clause is printed in Italicks, as demanding particular

propriator
tithe, to

particular
markable
every Cl

About
stituted
The pari
act that
legal Inc
his Advo
ing this,
picion or
of his b
in some
the well
ports, in
Howev
mitted to
reputation
a summary

* This is
easy by the
their titles.
shall be made
mandate and
shall be regis
fied by affida
mandate, ret
Register, who
of induction

propriator, in any suit for the subtraction of prædial tithe, to prove that such person was and is reputed to be Incumbent

particular note, because from it has sprung the most remarkable controversy on this act, and one with which every Clergyman should be well acquainted.

About 15 years since a Clergyman in the South instituted his suit for the subtraction of prædial tithes. The parishioners pleaded according to the words of the act that the person prosecuting the suit was not the legal Incumbent or impropriator. The Incumbent and his Advocates insisted that the parishioners merely pleading this, without shewing some ground to raise a suspicion or doubt in opposition to the general reputation of his being Incumbent or without setting up a title in some other, was a great harshness, and contrary to the well known principle in Sir W. Blackstone's Reports, in Powell and Milbank, p. 852.

However since the words of the act were so, he submitted to it, and to proving his title by evidence *beyond* reputation*; and therefore offered *viva voce* evidence in a *summary* manner, of his being Incumbent.

* This is now as far as relates to getting legal possession, rendered easy by the act 25 Geo. III. ch. 38. made to enable Clergy to prove their titles. By this, on Ordinary's mandate for induction, a return shall be made by the giver that it hath been given accordingly; which mandate and return, with the certificate of assent and qualifications, shall be registered in the diocese, the return and certificate being verified by affidavit of one of the witnesses before the Register. Such mandate, return, certificate and affidavit, or a copy attested by the Register, whose fee is five shillings, is competent evidence in *all* courts, of induction and qualifications.

Incumbent or Impropriator of such parish, and had acted as such at or before the time the right of the tithes

The Ecclesiastical Court was of opinion that this mode would not do, and that the plea put it upon the Incumbent to proceed in a *plenary* manner.

The Incumbent (besides representing the hardship of this very expensive and tedious mode upon him, where (as the fact was) every man in the parish refused to pay tithe, and the heavy expence on the Defendant, if he was cast, whereas in the summary his costs could be only 1l. 6s. 8d.) insisted that no such construction could possibly be made on or from the act. That the words of the act in its *fourth* section are plain, that all *prædial* tithes shall be sued in the *summary* way, and that the meaning of the *third* is plainly and only this, that where the title is denied, reputation of it shall not be sufficient, but the Incumbent is to prove it by further evidence; but that no shadow of argument could be brought to prove that the act meant that this evidence was not to be given in a *summary* way, nor was there a single word in the act to that purpose, or speaking of *any* proceeding (subsequent to the act) in a *plenary* way.

The Diocesan Court however (in which the matter was tried) was of opinion that the proceedings (after such a plea as above mentioned being put in) ought to be summary, and was certainly supported in that doctrine by some considerable legal opinions that were taken: on the other hand the Incumbent was supported by the opinion of the late Dr. Radcliffe, and of another very eminent

ment

tithes
any other

ment Civ

humble b

liament a

that the p

ting the l

to do *sum*

Metropol

to the La

Thus m

see of titl

her, the

Foley was

the Court

to the Co

after muc

the groun

because th

an Impro

The mis

thus, and f

to the Cle

the author

bill which

Act 7 Geo.

udings sho

advantage of

be deemed

tithes sued for accrued, without producing or proving any other title, except the title of the person promoting such

ment Civilian, to which I had the honor of adding my humble but clear conviction, that under this act of Parliament all the proceedings ought to be summary, and that the plea made no manner of difference except putting the Incumbent to prove his title, which still he was to do *summarily*, and with those latter opinions, the Metropolitanical Court of Cashel upon *appeal* agreed, and so the Law seemed to be established.

Thus matters stood when in the cause of Foley (Lessee of tithes under the Duke of Devonshire,) *v.* Moher, the latter having pleaded in a Diocesan Court that Foley was not the true Incumbent or Impropiator, and the Court having proceeded *summarily*, Moher applied to the Court of Kings Bench for a prohibition, which after much debate was granted; partly as it seemed, on the ground of the *proceedings* being *summary*, and partly because the plea was true, inasmuch as Foley was not an Impropiator but the *lessee* of an Impropiator.

The mischiefs which must ensue from the Law standing thus, and from the expence of plenary proceedings grievous to the Clergyman and ruinous to the peasant, induced the author of this work to introduce into parliament a bill which passed the House of Commons, *to explain the Act 7 Geo. III. and declare its meaning to be that all proceedings should be summary, and also to give to lessees the advantage of it, and also to declare that the title should not be deemed to be controverted unless a title was set up in some*

such suit shall be controverted, and it shall be pleaded by the party so sued in such causes that the person prosecuting

some other person, and it was shewn who was entitled. Unfortunately when it went to the Lords, the then Chief Justice of the King's Bench, most erroneously imagined that it implied a condemnation of the determination of the Kings Bench, and the bill was altered, and passed with no manner of likeness, either in spirit, intention or words, to the bill which went from the Commons, tho' it still continued in vulgar parlance to bear its first authors name, and brought on him blame for certain inconveniences which have ensued from it.

This Act 35 Geo. III. chap. 32, leaves the question whether the proceedings shall be summary or plenary after title denied, as they were before; it provides that the title shall not be deemed to be controverted unless the plea denying it be verified by oath or affirmation of the party to the best of his knowledge or *belief*, and it declares that all who sue for prædial tithes, both Clergy and Lay, and whether by right original or derivative from or to the use of another, may proceed as by 7th Geo. III. and be entitled to all rights and benefits therein or by this act given.

This statute then leaves the main question of controversy as it found it; it is useful in doing away all doubt as to Lessee's &c. &c. right of suing, but in suffering the simple denial of a title, although verified by oath as to best of knowledge or belief, to force the Incumbent into proof of his, has done infinite mischief, for it has
and

*secuting
or Impr*

and will
cause ho
there is
nothing
has no
pence, w
pletely o
supportin
are plena
part of h
ous.

Since t
sent year,
bition wa
had been
her again
dilatory w
the proce
weight of
can be b
and becau
seeming d
proceeded
tack, and
Nothing I
for a proh
circumstan

secuting such suit is not the true and legal Incumbent or Impropiator.

By

and will produce perjury, which cannot be punished, because how it can be proved that a man doth not *believe* there is want of title in another: in short a bad man has nothing to do, but to swear he *believes* the Clergyman has no title, and he harasses him with prodigious expence, which if done by a number of parishioners, completely ousts him of his income, by the impossibility of supporting so many suits, especially if the proceedings are plenary, besides the chance of his failing in some part of his legal proof of that which is in fact notorious.

Since this act passed, and in the course of the present year, in the cause of *Macnamara v. Noble*, a prohibition was moved for in K. B. because the proceedings had been plenary; (that the application in *Foley v. Moher* against summary proceedings had been vexatious and dilatory was evident, because no fair Defendant can wish the proceedings to be plenary, since he thereby risks the weight of full costs, whereas in the summary, the costs can be but 1l. 6s. 8d.) here the ground was changed, and because the Court below in compliance with the seeming disposition of K. B. in *Foley and Moher*, had proceeded *plenarily*, the party changed his mode of attack, and made his complaint the converse of *Moher's*. Nothing however was decided, because the party came for a prohibition after sentence, and too late, under the circumstances of the case,

To

By the fourth section, before *any* citation shall issue under the seal of any Ecclesiastical Court for subtraction of prædial tithes, a petition is to be lodged in the registry of the Court, in which shall be inserted all the prædial tithes then due, so as that no second suit shall be commenced for any prædial tithes due before that time, and a copy of this petition or complaint is to be served upon the party so to be cited, along with the copy of such citation; the citation to give 30 days after date for appearance, and to be served as usual in 3 days after date, and to intimate that whether the party shall appear or not at the time and place appointed, the Judge will nevertheless proceed in a *summary* way to hear and *finally* determine such cause, *upon the day* (51)

To remedy all these inconveniences nothing will suffice but such a bill as the Author introduced, which ought to be equally desired by the Clergyman and the Farmer; but the introduction of such a bill is always a matter of delicacy, because the house always starts at the name of a tithe bill before its tenor is even known, and afterwards by alterations as in the present case it often comes out a mischievous instead of useful law.

(51) The courts do not construe these words so strictly as to exclude themselves from continuing the cause to another day, if they are not able to hear it in one.

assigned

assign
and du
endor
Judge
way, t
minati
legal p
ther p
his Pro
sent, v

(52)
Judge to
Lawyer
that the
would p
the secti
suits. H
ceedings
what it v
when we
—where:
“suits, th
“parties
“in a *ple*
“the per
(53) T
best illust
of prædia
VOL. I

assigned by such citation: and on return thereof and due proof of service (on oath before the Judge) endorsed or annexed, it *shall* be lawful for the Judge thereupon to proceed in a *summary* (52) way, to hear and determine such cause by examination of witnesses, *viva voce*, and such other legal proofs as shall be offered on behalf of either party, either in presence of the party or his Proctor, or in pain of his contumacy if absent, with costs not exceeding 1l. 6s. 8d. (53).

No

(52) Here it is said that it *shall be lawful* for the Judge to proceed in a *summary* way, which words every Lawyer knows are imperative; and before, it was said that the intimation to the party was to be, that the Judge would proceed in a *summary* way; and the beginning of the section speaks of *any* citation, and extends to *all* the suits. How then can there be any doubt that the proceedings ought *always* to be summary, let the plea be what it will, (no exception is made for any plea) especially when we read these words in the preamble of this section—whereas by the present method of proceeding in the suits, the parties cited are put to great expence, and the parties promoting greatly delayed, and suits carried on in a *plenary* manner to the great trouble and expence of the person so sued.”

(53) The mode of proceeding under this act will be best illustrated by an example of a suit for subtraction of prædial tithe.

No subscription of Advocate or Proctor is necessary to such petition, nor is any exception allowed for want of form, and either party may appear without a Proctor; Judges and Registers are required to receive such appearances, and to determine in the most summary manner, not regarding form but justice only, without receiving any fees, but in lieu of them it shall and may be lawful for the Ordinaries of every diocese to grant to the Judge and Register such sum out of their proxies due at their annual visitations, as they shall think reasonable (54).

FOWLER v. KEELING.

Proceedings in a suit for pradial tithes.

Petition or complaint read, which states that Defendant had in each of two years, 1796 and 1797, one hundred and fifty loads of hay on his ground, the tithe of which was valued in each year at 7l. 10s. Service proved on the 13th of November. He was cited to appear on the 13th of December, that is thirty days exclusive of the day of service.

C. proves A. to be the reputed Rector of the parish, and that the lands are within the parish of Dale, and proves the quantity of land, not from actual survey, but from his eye being used to judge of land, and also the quality of the hay, and the value of it in each of the said years.

D. doth the same, two witnesses being required by the Civil and Ecclesiastical Law; A Decree for 15l.

(54) Notwithstanding this clause, except in two, or

The

The mode allowed by the statute of 33 Hen. VIII. of enforcing the decree for tithes by the authority of two Justices, is done away, and in its stead it is enacted that if the party condemned neglect to pay the sum due and cost for 15 days after due service of the monition, he may, if the sum be not above 20l. be sued by Civil Bill at the next assizes, or wherever Civil Bills may be brought; and a true copy of such monition under the seal of the Court, and proof of such service thereof, is conclusive evidence, and there shall be execution and costs as on other Civil Bills (55); but this not to prevent any appeal from the Spiritual Court in same manner as be-

I believe at most three dioceses, no such allowance is made to the Judge or Register.

(55) This mode of enforcing payment, I conceive to be only collateral and optional, and that the Clergyman may if he pleases proceed by excommunication, and application for the writ de Excommunicato capiendo, as he must where the sum is above twenty pounds, and as it is acknowledged he must have done when he proceeded *plenarily*, and that is one of the inconveniences which must ensue from a determination that in any case the tithe suit still must be *plenary*.

A strange idea has prevailed with some practitioners in country courts, that no suit can be instituted for tithe in the Ecclesiastical Court, where their value is above twenty pounds.

fore ; Defendant to give in evidence on the trial of the Civil Bill any legal or equitable discharge subsequent to the sentence, and the Court to be a Court of equity for the Defendant, so as to enable him to examine the Plaintiff or his Proctor or Manager on oath, on giving them reasonable notice to attend (56).

The power of two *Justices of the Peace* to determine tithe suits is confined to tithes or dues not above ten pounds a-year due by Quakers, by 7 G. III. made perpetual by 11 and 12 Geo. III. ch. 19. and to those not exceeding forty shillings due by any person, by 1 Geo. II. made perpetual by 13 and 14 Geo. III. ch. 41. An act

(56) The Clergy will find it useful to have the few following memoranda always in recollection, as to the person against whom the tithe suit is to be brought.

If hay be put into recks on the grounds, and afterwards sold, the *feller* is to be sued for the tithe, and not the buyer. But if corn in the ground, or grass be sold, the buyer and not the feller must pay the tithe, but if any part be cut before the sale, the *feller* pays so far ; if the owner of a wood cut and sell it all together, he pays the tithe. If tithable things be pledged, it is said, that he to whom they are pledged must pay the tithe. If a parishioner die before he pays his tithe, his executor, if he has assets, must pay them. The English statute Edw. VI. for recovering treble value not of force in Ireland. See Appendix.

amending

amending
to one
under
recover
Equity

The
four da
adjudge
trefs.
tion, m
of exer
estopped
In proce
marily a
the next

The
tithes, a
them as

This
advisable
important
parishioner
under th
ence of p
a modus

(57) Th
power, bu
in that Co

amending that last mentioned, and giving power to one Justice to determine, where the sum is under five shillings, and an act for more easy recovery of small tithes by petition in Courts of Equity, have expired.

The Justices under the small tithe act, after four days notice, hear, examine on oath, and adjudge under hand and seal, and levy by distress. Appeal lies to sessions, but if prescription, modus, composition, agreement, or title of exemption be relied on, the Justices are estopped, which makes that mode of little use. In proceedings against Quakers they examine summarily and levy by distress, and Appeal lies to the next assizes.

The *Exchequer* takes cognizance of suits for tithes, and assumes a *concurrent* Jurisdiction over them as incident to matters of *account* (57).

This mode of suing in the *Exchequer*, is advisable, where the matter is of considerable importance, or where a great number of parishioners are to be sued for the same cause under the same circumstances for the convenience of putting them in one bill, and also where a modus is denied.

(57) The Court of Chancery is said to have the same power, but I never knew an instance of a bill for tithes in that Court.

We

We must not forget the act 35 Geo. III. ch. 25. which transfers the civil bill jurisdiction as to decreeing sums due for tithes, to the assistant Barristers, or that of 38 Geo. III. ch. 18. which orders that tithe notes for sums not above two pounds ten shillings, shall pay no stamp duty.

G L E B E S.

The statutes in Ireland relative to glebes relate principally either to endowment (58) of Churches with

(58) Ancient glebes having been lost in the confusion of civil wars, all persons might endow Churches without licence of Mortmain, having no glebes, or not above ten acres, with new glebe, provided the whole together do not exceed forty acres, by an act so early as 15 Ch. I. ch. 11. But this act being found to produce little effect, another was passed, 8 Geo. I. ch. 12. to encourage endowments by enabling the Endower to reserve a rent out of endowment, under such covenants as should be agreed between him and the Incumbent, with consent of the Bishop and Metropolitan, expressed by certificate in writing. Both endowment and certificate to be enrolled in Chancery in six months; but no endowment to be made out of the Endower's demesne lands, sec. 1, 2, 3.

The law was still found to be deficient, on account of the

with glebe (which may be either by laymen, or Bishops, or other Ecclesiastical persons (59) or to

the shackles imposed by entails, and therefore the statute 1 Geo. II. ch. 15. was enacted, enabling tenants in tail to grant glebes directly by deeds, under no other restrictions than those imposed by the former acts on tenants in fee simple; and the more to encourage them to do so, easy remedies are thereby provided, for recovery of the rents and enforcement of the covenants by them reserved, by application to the Bishop, who is empowered to sequester the benefice for that purpose, sec. 3. 4. And the same act, sec. 2. authorizes the conveyances of glebes in trust for the Curates of appropriate parishes, or other Ecclesiastical persons having actual cure of souls in such parish, who had not been considered in former acts.

The statute 3 Geo. II. ch. 11. extended this power of endowment as far as twenty acres, to the tenant for life with immediate remainder to their issue, the Sheriff having power to make such enquiry therein; and the statute 31 Geo. II. ch. 11. enables tenants in fee simple, fee tail, or for life, to grant lands under the other restrictions of the former statutes, not only in fee, or fee farm, but for lives renewable for ever. No more than one Church is to be endowed in an union. Endowment of glebe doth not make the Rector a freeholder.

(59) The act 2 Anne ch. 10. was the first which enabled Bishops and other Ecclesiastical persons with such consents as therein to grant lands belonging to their preferments, for glebe for any Church, provided such lands were

to the purchasing of glebes (60) or to the exchange of glebes, where convenient for such glebe, and did not exceed twenty acres, and the Church already be not endowed with more than twenty, at the moiety of the present rent as above.

8 Geo. I. ch. 12. extends that power as to Bishops to forty acres, provided that such quality of land so granted, &c. &c.

1 Geo. II. ch. 15. extends the power to twenty acres, where Church not endowed with ten; to grants in trust to resident Curates or impropriations, sec. 6.

And same act, sec. 7. extends the power to lands held by Deans and Chapters, as bodies politic.

And 31 Geo. II. ch. 11. extends the power of granting glebes to lands held by them at any distance from the Church to be endowed, provided they be granted only with a view to an exchange with lands more convenient, and such exchange perfected in two years.

(60) I find no act relative to purchasing of glebes, save and except 10 W. 3. ch. 6. which enables Ecclesiastical persons with the approbations therein, to purchase not only houses, but also lands and tenements fit for building, for the habitation and residence of them and their successors for ever, thenceforth to be part of their demesne glebe, or mensal lands respectively, with power to charge their successors with two-thirds of the purchase money. There is indeed an act enabling Bishops to purchase lands, and make them mensal lands, 12 Geo. I. ch. 10. and an act 11 and 12 Geo. III. ch. 17. that fee farm or lives renewable for ever may be deemed purchase.

change

change
to cont

(61) 2
and othe
change g
parish C
the same

8 Geo.
bishops,
Prebenda
inconveni
lie more
provement

(62) 10
Archbisho
Prebendar
Vicarages,

Tenant
tors, Mast
rations ma
glebe not

15 and 16

Though
in possession
must be ex
23 and 24

* This is af

VOL. I

change of glebes (61) or to the union of glebes to contiguous parishes (62).

(61) 2 Anne ch. 10. sec. 1. enables Rectors, Vicars, and other persons having cure of souls, by deed to exchange glebes or part of glebes, at a distance from the parish Church, for land of equal value, contiguous to the same,

8 Geo. I. ch. 11. sec. 1. extends this power to Archbishops, Bishops, Deans, Archdeacons, Dignitaries and Prebendaries, as also to exchange their mensal lands inconveniently situated for others of equal value that lie more convenient, and are fitter for building and improvement,

(62) 10 Geo. I. ch. 6. goes further and enables every Archbishop, Bishop, Dean, Archdeacon, Dignitary and Prebendary with consent therein to exchange Rectories, Vicarages, or portion of tithes for lands of equal value.

Tenant in tail and tenant for life in possession, Rectors, Masters of Schools may exchange; and lay corporations may endow, where not above ten acres*, with glebe not above forty. 13 and 14 Geo. III. ch. 27. and 15 and 16 Geo. III. ch. 17.

Though the land at a distance, tenant in fee or tail in possession may grant not above forty acres, but this must be exchanged for convenient land in two years, 23 and 24 Geo. III. ch. 49.

* This is afterwards raised to twenty.

The most important rules as to glebes antecedently to these statutes were, that every Church is of common right entitled to house and glebe, for without them no Church could regularly be consecrated—that the fee simple of the glebe is in abeyance—that after induction the freehold of the glebe is in the Parson, but so that he could not alienate, exchange, or commit waste—that glebe lands in the hands of the Parson, unless leased, should not pay tithe to the Vicar nor vice versa, for *Ecclesia decimas Ecclesiæ solvere non debet*.—And that the glebe being sown, if the Parson dies before severance from the ground, his Executor shall have the corn; but if the Parson dies, be deprived, or resigns after severance, and before the corn is carried off, the successor shall have no tithe, because the right had vested.

Let me add the case of the Parson having leased his glebe after sowing, or having sold the corn, for then tithe is paid; and formerly the rent could not be apportioned where the Incumbent died in the intermediate time between two gales being due, but now I conceive, he, by a late statute, stands on the same footing with any other landlord, who is tenant for life (63).

(63) See stat. 23 and 24 Geo. III. ch. 46.

CHURCHES AND CHURCH-YARDS.

The Canon Law in a division similar to that of the Civil, means by *sacred* things those prepared *ad cultum divinum*, such as Churches and altars (64), by *sanct* those protected by religious awe, as Sepulchres, by *religious* things those designed for pious uses as hospitals and other charitable foundations.

Churches. The Canon Law, which on this head is our law at this day, forbids any Church to be erected, without leave of the Bishop: and this was reasonable, because if a Church was erected, without a sufficient revenue to support an Incumbent, the weight of making provision for Divine Worship in such a Church fell on the Bishop. The erection of a new Church or Chapel may also be opposed by any private person who thinks himself aggrieved thereby.

Various causes may render the erection of a new Church necessary or proper, such as the increase of inhabitants in a given district, or the increase of revenues in a large parish. The legislature in Ireland usually supplies funds for this pious purpose to a certain degree by grant-

(64) The Roman Catholics add vestments and reliques.

ing a sum of money annually, commonly five thousand pounds, to the trustees of the first fruits (65) to be thus employed at their discretion.

If an old Church in ruins is to be rebuilt, or even if a Church be so small that it needs to be enlarged, by the Common Law the *major* part of the *parishioners* (having first obtained the consent of the Ordinary to what is needful, and meeting on due notice), may make a rate for new building or enlarging as there may be oc-

(65) They may also apply it to building glebe houses by 29 Geo. III. ch. 18. *First fruits* otherwise called Annates were the produce in the first year of Ecclesiastical preferments claimed by the Pope, who also claimed tenths, and at other times twentieths of the same, as the Clergy did of the produce of the ground. At the reformation the claim was transferred to the Crown, but Queen Anne, (whence it is vulgarly called Queen Anne's bounty) vested this fund in Trustees for the purpose of augmenting small livings, &c. &c. but as instead of the real value of the living, its value in the King's books for one year is only paid, Dr. Christian in one of those able notes on Bl. Comm. which do him so much honour, has marked the inadequacy and misinterpretation of this fund, and the Legislature of Ireland, by an act 29 Geo. III. ch. 26. shewed a strong inclination to make it more effectual.

caſion

caſion (with a biſhop be built to be ſo Proteſtants aſſeſs a notice at a ver Confe the Biſt ſtands. ed, bu once co but if (66) M (67) S 12 Geo. ones, and acts ſhoul of ſcite a From this E. G. w where fro ings it w extremely jority of Parliamen building S

caſion (66). But the Chief Governor of Ireland with aſſent of fix of the Privy Council, Arch-biſhop and Biſhops may order new Churches to be built in better places, and where the ſcite is to be ſo changed, the conſent of the majority of Proteſtant pariſhioners in *veſtry* is ſufficient to aſſeſs a rate for building the new Church on notice three Sundays before; no *Papiſt* to vote at a *veſtry* for repairing or rebuilding (67).

Conſecration of the Church ought to be by the Biſhop of the diocēſe in which the Church ſtands. Divine Service to be thereat performed, but it may be on any day. A Church once conſecrated is not to be conſecrated again; but if polluted, the pollution is done away by
a method

(66) Mod. Rep. Vol. I. p. 236. and Vol. I. p. 222.

(67) See ſtatutes 2 Geo. I. ch. 14. 10 Geo. I. ch. 6. 12 Geo. I. ch. 9. theſe acts are perpetual by ſubſequent ones, and ſee 23 Geo. III. ch. 21. It is ſingular that theſe acts ſhould have given this power of aſſeſſment on change of ſcite and not to rebuilding Churches on an old ſcite. From this odd overſight, I have known much difficulty, E. G. when St. Peters Church in Cork was rebuilt, where from the vicinity of the almoſt contiguous buildings it was impoſſible to change the ſcite, it became extremely arduous to get the legal aſſent of the majority of the pariſhioners to the impoſition of a rate. Parliament ſometimes interpoſes its authority, as in rebuilding St. Nicholas in Dublin.

By

a method called reconciliation. The Common Law takes no notice of a Church until consecrated, but by the Ecclesiastical Law, on special occasions licences may be granted to perform Divine Service and administer the Sacraments, in Churches and Chapels not consecrated. If Church-yard be enlarged there is a consecration of the additional part.

Churches and Church-yards thus consecrated must not be violated or profaned. In ancient times it was not unusual to hold fairs and markets in the Church-yards, and to have certain feasts and entertainments in them, such as plays and dramatic performances, and to hold

By statutes in Ireland, Archbishops and Bishops may erect new Churches in convenient places as they think fit, if parish Churches too small or too far, by 11 and 12 Geo. III. ch. 16. to be deemed new parishes and perpetual cures; vide ante.

Tenants in fee, and tail and for life, Corporations, Bishops and Dignitaries may grant one acre whereon new Church is to be built, 19 Geo. II. &c. &c.

Cathedrals may be removed by the Chief Governor with consent to a convenient parochial Church, that is the Church may be made a Cathedral, 21 Geo. II. ch. 8.

The converse power, viz. to make an old Cathedral a parish Church also being much wanted, a general act was brought in last session by the author for that purpose, and passed. A particular one passed before for the diocese of Ferns.

inferior

inferior
All fu
the Ca
No
nor ca
withou
to a fa
in the
in the
Tempo
the nat
Prop
commo
Church
hold of
ance, l
Church
cut dov
the Inc
appropri
cel is
the Ch
repair

(68) 7
—abroad
withstand
be suppo

inferior courts there, such as the court leet. All such profanations have been forbidden by the Canons and provincial constitutions.

No person must encroach on the Church-yard, nor can any one make a private door into it, without the consent of the minister, superadded to a faculty from the Bishop. If persons offend in these respects, there is a remedy, sometimes in the Ecclesiastical Courts, sometimes in the Temporal, according to the subject matter, and the nature of the plea put in by the Defendant.

Property in the Church and Church-yard. Of common right the soil and freehold of the Church-yard is in the Parson, and so is the freehold of the Church. The fee simple is in abeyance, but if the walls, windows, or doors of the Church be broken, the trees in the Church-yard cut down, or grafs eaten by a stranger's cattle, the Incumbent may have his action. If it be an appropriation, the freehold and soil of the chancel is in the appropriator, that of the body of the Church in the Vicar who is also bound to repair the same (68); but the *use* of the body
of

(68) The Rector is only bound to repair the chancel—abroad the Incumbent repairs the whole Church. Notwithstanding this *property* in the Parson, *property* may be supported by a parishioner in an *isle*, not by sitting there

of the Church is common to the parishioners, who accordingly have seats allotted to them in it.

Trees and Herbage in Church-yards. These, as appertaining to the soil, are the right of the Parson; but he must not fell them, unless for the reparation of the chancel, and if it appears that he intends to cut them down for any other purpose, a prohibition will be granted to stay waste. And if they be actually cut down, the persons doing so, may be indicted and fined.

The goods of the Church. Robbery from a Church is punished by the Temporal Law (69) in the same manner, as robbery from a dwelling house. So if the goods of the Church are taken, not with felonious intention, the Church-war-

there or burying there, but by shewing a custom of repairing it immemorially, and a man may prescribe to have a way through the Church or Church-yard. From the principle of the freehold being in the Parson, it follows that if a man puts up a seat in the Church, and another pulls it down, trespass *vi & armis* cannot be brought by him; yet where the Church-wardens cut the timber, the action lay, and on the same ground Church-wardens cannot grant licence for burying in the Church, but by custom they may have a fee thereon, for repairing the floor.

(69) If a Church be entered and robbed in the night, it is Burglary. Watson, 303.

dens

dens (or oth
again
the S
the th
Seal
Churc
by im
major
ber of
of seat
seats g
be gra
tion th
parish,
and dw

(70) 'belong to
ibid.

(71) 'fold, wh
the Ord
the Chur
not in u
ralled to
try Chur
you bring
vestry ro
mention a

VOL.

dens (70) may maintain an action, viz. trespass or other possessory action, and recover damages against the takers, or they may sue them in the Spiritual Court, in which case they recover the things themselves.

Seats in the Church. The disposal of seats in a Church is the right of the Ordinary (71), but by immemorial custom, the Churchwardens and major part of a parish, or even a certain number of the parishioners acquire a right to dispose of seats, and this is the case in London. The seats granted by the Ordinary or otherwise, may be granted to a person and his heirs, on condition that the grantees remain inhabitants of that parish, but not otherwise; for if they go away, and dwell in another parish, they cannot retain

(70) The goods of the Church, as chalice or surplice, belong to the parishioners, not to the Parson. Watson, *ibid.*

(71) Yet in new Churches the seats are perpetually fold, which must be understood to be by permission of the Ordinary, for the better assisting the building of the Church. When this rule first prevailed, pews were not in use. The congregation sat on long benches parallel to each other, as is still seen in some of the country Churches in England; and in the Churches abroad you bring a chair, or hire it from the Sexton. In many vestry rooms the tables of fees, which are hung up mention a fee for assignments of seats.

their seats. And if a house be in lease, to which a seat is annexed, and the lessor lives in another parish, the lessor cannot retain the seat.

Though the freehold of the Church is in the Parson, and the seats be fixed to the freehold, yet the use of the Church to hear Divine Service is common to all the people that repair them; and if a seat, though fixed to the Church, be taken away, Church-wardens, and not Parson bring the action. But the Ordinary may appoint what person shall sit in each seat.

We have said that the power of the Ordinary to dispose of seats, may be taken away by custom; it may also be opposed by prescription, i. e. seats may be prescribed for, as belonging to certain houses, and going always with them to the owners of such houses. This right depends upon such seats having been always repaired by the owners of those houses, which reparation must therefore be pleaded to support the right, except in case of prescription for an isle, or where the possessor of a seat brings an action against a disturber.

The prescription we have mentioned, cannot be for the seat as appropriated to lands, but to a house. The owner therefore of land in a parish, inhabiting in another, cannot prescribe for a seat in the Church of the former.

It

It ha
be pres
rith.

Upo
priated
persons
they be
case th
houses

Not
be claim

Chur
leries at
be done
if the
rithione
caction fo

Ornan
pels. T
desk, fo
sels for t
wine, t
largest v
book of
degrees,
ed by t
Church-

It hath been held, that a seat in an isle may be prescribed for by an inhabitant of another parish. An whole isle may be prescribed for.

Upon the whole then, seats may be appropriated to *persons*, (in which case upon those persons ceasing to be inhabitants of the parish, they become vacant), or to *houses*, in which case they appertain to the inhabitants of those houses for the time being.

Not only a seat, but priority in a seat, may be claimed by prescription.

Church-wardens cannot erect new seats or galleries at their own pleasure. Some say it cannot be done without licence of the Ordinary. But if the Incumbent, Church-wardens, and parishioners agree on the necessity, there is no occasion for the Ordinary to interpose.

Ornaments and Furniture for Churches and Chapels. The communion table, pulpit, reading-desk, font, chest for alms, chalice and other vessels for the communion, and also the bread and wine, the minister's surplice, a bible of the largest volume, a book of Common Prayer, the book of Homilies, and a register book, a table of degrees, and of the ten commandments are directed by the *English Canons* to be provided by the Church-wardens. The parish is required to provide

vide a basin for the offertory (72) by the *rubric*. The provincial constitutions require that the parishioners should find at their own charge, a chalice or cup for the sacramental wine, bells with ropes, and a bier for the dead (73).

Repairs. The parishioners are bound to repair the whole Church (74) except the chancel which by the custom of England is to be repair-

(72) The offertory was formerly an oblation for the use of the Priest, at the reformation it was changed to alms for the poor.

(73) The Canons in Ireland differ a little, requiring Churchwardens to provide two books of Common Prayer, a Bible of the last translation, (another where all or most are Irish, in the Irish tongue), a reading seat, a pulpit, a font, a communion table suitably covered, and the bread and wine. All at the charge of the parish.

Before the reformation, there were also required a legend, antiphonar, grail or gradual, psalter, ordinal, missal, manual, chesible, i. e. the garment worn by the Priest next under the cope, Dalmatica or Deacon's garment, tunic or Subdeacon's garment, frontall or pall, three towels, three surplices, a rocket or surplice without sleeves, a cross for the dead, a pyx, and an osculatory.

(74) Seats therefore are repaired at the common charge of the parish, except prescribed for; and if there be but one Church in united parishes, the parishioners of each parish in the union must contribute to the repairs, unless they will rebuild their own.

ed by the Parson (75), and also except such private isles or chapels, as belonging to private persons are to be repaired by them.

The parishioners are also bound to fence and keep in good order the Church-yard, but if the owners of lands adjacent have used time out of mind to repair so much of the fence as adjoined to their ground, they may be compelled to do it, by action at Common Law brought by the Church-wardens.

As Rectors, so Impropriators are bound to repair the chancel, except where by special custom the burthen falls on the parishioners. The Impropriator, as to the parsonage lands, is compensated by a discharge from the repairs of the Church, but a rate may be imposed on his other lands in the parish, and he has the chief seat in the chancel also, where no other person by prescription claims it (76).

It is part of the superintending care of the Bishop to watch that necessary repairs be done, and therefore a query as to the state of Churches

(75) If both Rector and Vicar, each contributing in proportion to his benefice, except by some special custom it be thrown upon one of them.

(76) In what manner the Impropriator is to be compelled has been questioned, and also whether the parishioners may not impose a rate to repair the chancel.

forms

forms an article always at visitations, but the repairs are to be actually made under the inspection of the Church-wardens or Questmen, and they may be cited into the Spiritual Court and punished if they neglect it. For by the Canons they are *more immediately* bound to take care that the Church or Church-yard be maintained in good order and repair.

They must take care however in repairing not to make additions without the consent of the parishioners, for if they do, they must pay for them; and, though the Church-wardens are not charged with repairs of the chancel, they are charged to see that it do not fall to decay, and if necessary to make presentment thereof at the visitation.

CHURCH RATES.

Rates or Cesses must be imposed to perfect these repairs, and these parish cesses are to be made and agreed upon in vestry, (in which however in Ireland papists have no vote (77) by the Churchwardens and major part of the parishioners assembled upon public notice given, and if no parishioners attend, the Church-wardens alone may make the rate, and so if the

(77) By 12 Geo. I. ch. 9.

vestry

vestry
the rate
pairs no
ed and
The
applot
levying
statute
is given

(78) P
be made,
In ten
be applot
Churchw
purpose.

This ap
the Minis

The fir
public no
also of a
tice.

The pu
amine faic
the Protec
jections a
and finally

Objectio
ly settled

vestry assembled will not make the rate. If the rate be not made, and consequently the repairs not done, the Church-wardens must be cited and punished.

The method of calling a vestry to impose and applot those Church rates, and of collecting and levying them, is in Ireland regulated by the statute 3 Geo. II. ch. 11. the substance of which is given in the note (78), but this act says nothing

(78) Parish cesses, for the repairs of Churches, are to be made, and agreed upon in vestry.

In ten days after they are so agreed on, they must be applotted upon the *inhabitants* of the parish, by the Churchwardens, or by other persons appointed for that purpose.

This applotment, when made, is to be returned to the Minister of the parish.

The first Sunday after he receives it, he is to give public notice thereof after service in the morning, as also of a vestry to be held in ten days after such notice.

The purpose of this last mentioned vestry, is to examine said applotment, and there the major part of the Protestant parishioners assembled, may hear any objections and make any just and reasonable alterations, and finally settle the applotment.

Objections being discussed, and the applotment finally settled and ascertained, the vestry is to cause two parts

thing of the rule which should direct and govern the applotment and its proportions, which therefore must be sought for in the ancient law.

The general principle of direction is that every man is to be rated according to his ability; that ability to be judged of, if it be a country parish, by the value of the lands he holds in that parish, but in towns by the value of the house he inhabits.

Land occupiers in all parishes as to every cess for repairs or charges, are to be deemed inhabitants (79) and this is confirmed in Ireland by an

parts thereof of it to be made, each to be subscribed by the Minister, Church-wardens, and three of the Protestant parishioners then present, one to remain with the Minister and parishioners, and the other to be delivered to the Church-wardens.

The Church-wardens must then collect the money, and if necessary may levy it by distress and sale, together with the charges of such distress, having first obtained a warrant for that purpose, under the hand and seal of two justices of the peace of the county, wherein the parish lies. See also 12 Geo. I. ch. 9.

(79) A distinction is made between *real* rates for repair of the fabric of the Church, and personal for ornaments. In the last case, it is said, that the rate is according to the goods, not the land, and therefore owners of lands not dwelling in the parish, do not pay.
The

an exp
land o
rate.

In ci
is the
and reg
of the
are ma
nister's
III. ch.
Grand J

Are e
Chapels
Privat

(80) TH
ney is 17
chief gove
to incumb
out of eac
ceeding tw
Commission
pounds a-y
able quarte
payment d
to issue in
for new ho
VOL. II.

an express statute 11 and 12 Geo. III. ch. 16. if land or house be demised, the lessee pays the rate.

In cities and towns the Minister's money (80) is the direction as to the value of the house, and regulates the proportion of all applotments of the Church rates whatsoever, which seldom are made to exceed on any account the Minister's money itself, which is also by 33 Geo. III. ch. 56. made the standard for applotting Grand Jury presentments on parishes in Dublin.

CHAPELS.

Are either private Chapels, free Chapels, or Chapels of ease under a mother Church.

Private Chapels are such as noblemen or others have

(80) The principal statute relative to Minister's money is 17 and 18 Char. II. ch. 7. which enacts that chief governor and council may allot sums to be paid to incumbents with cure in cities and town corporate, out of each house, in the respective parishes, not exceeding twelve pence per pound, as valued on oath by Commissioners. No house to be returned at above sixty pounds a-year, though valued higher. The money payable quarterly, and levied by Church-wardens, on non-payment distress and sale. Commission of valuation not to issue into one parish more than once in three years for new houses. Whether linnies, out-houses, cellars,

have at their own private charge built in or near their houses, for them or their families.

Free Chapels are those which are exempt from all ordinary jurisdiction. The King may erect a free Chapel, or may licence a subject to do so. Yet the Incumbents of free Chapels are generally instituted by the Bishop and inducted by the Archdeacon.

Of Chapels subject to a mother Church, some are merely Chapels of ease, others Chapels and parochial.

A Chapel merely of ease, is that which was not allowed a font at its institution; and which is used only for the ease of the parishioners in prayers and preaching; sacraments and burials being at the mother Church, and where commonly the Curate is removeable at the pleasure of the parochial Minister.

are to be valued, has been matter of great dispute; as also, whether houses so repaired as to be *quasi* new are to be valued afresh. A great contest upon these points arose not long since in the parish of St. Thomas, Dublin. I was concerned before the Privy Council in two oppositions upon those heads on valuations at Kinsale and Clonmell; in one we succeeded, in the other failed. The law doth not seem completely settled, but the better opinion seems to be, that dwelling houses alone are to be valued, and new houses on old sites, but no houses to be valued a second time.

A parochial

A pa
rochial
fers in r
rectory

Perfo
to the m
ing a Ch
cumben

One
where a
than fix
Same if
miles fr
another,
rate tow
of vestry
erect nev
to be pe
since tw

Archb
erect nev
are to be
paired b
from rep
be nomi
neglect f
and salar
dowing
salary.

A parochial Chapel is that which hath the parochial rights of christening and burial, and differs in nothing from a Church, but the want of rectory and endowment.

Persons going to the Chapel must contribute to the mother Church. To authorise the erecting a Chapel of ease, Diocesan, Patron, and Incumbent should agree.

One or two Chapels of ease may be erected, where any great number of inhabitants live more than six miles from the Church, 6 G. I. ch. 13. Same if inhabitants residing more than three miles from the Church, and more than two from another, 3 Geo. II. ch. 22. In cities and corporate towns, Bishop may erect them with consent of vestry, *ibid.* The Primate is empowered to erect new Chapels of ease in rectory of Armagh, to be perpetual cures, Anno 7 Geo. 3. ch. 17. since twice amended.

Archbishop or Bishop may in large parishes erect new Chapels, ascertaining the districts which are to be new parishes, the new Chapels to be repaired by their own assessments, and discharged from repairing any other Church. Curates to be nominated by incumbent, or by Bishop on neglect for two months, approved, and licensed, and salary allotted as usual, but incumbent endowing with glebe or tithes, is discharged from salary. 11 and 12 Geo. III. ch. 16.

LEASES.

The care eminently displayed by the Canon Law in guarding the property of the Church against designing or negligent members thereof by preventing their alienation, waste, or destruction of its possessions was supported in these countries, not without vigour, by provincial and legatine constitutions.

Yet by the common law, Masters and Fellows of any College, Deans and Chapters, Master and Guardian of an hospital and his brethren, *without any confirmation*, and Bishops, Deans, prebends, Parsons, Vicars, *with confirmation* of such persons as the law required, might make gifts in tail, or estates in fee at their will and pleasure, and leases for lives or years, without any limitation or stint.

The preference given to *aggregate* corporations must be immediately observed; they required no confirmation: the same confidence not being put in *sole* corporations, the leases of Bishops required the *confirmation* of Dean and Chapter,—of Deans that of the Bishop and Chapter,—of Prebends, that of the Bishop, Dean and Chapter,—of Parsons and Vicars, that of Patron and Ordinary.

The

The
cases, a
tioning
to tilla
England
ering al
(81) in
binding
for three

currence
they be
of the m
dered or
hereditar
most con
which th
twenty y
to be ma

This f
the farm
old incor
consequer

(81) Pa

(82) Bu
lease of In
Ecclesiastic
of debt.

The necessity of such confirmations in all cases, and the failure of them in many, occasioning insecurity to farmers and impediments to tillage, the *enabling* statute was passed in England in the 32d Hen. VIII. ch. 28. empowering all persons seised of an estate of *fee simple* (81) in right of their Churches to make leases binding their successors as well as themselves, for *three lives or twenty-one years, without the concurrence of any other person*, always provided that they be by indenture—from the making or day of the making—the old lease being first surrendered or within a year of expiring—of corporeal hereditaments (82)—of lands and tenements most commonly letten for twenty years past, on which the most usual and customary rent for twenty years past be reserved—and such leases to be made without impeachment of waste.

This statute made entirely for the benefit of the farmer left the Church open to many of the old inconveniences, losses, dilapidations, and consequent decay of divine service to which it

(81) *Parsons and Vicars* then were not included.

(82) But now by statute 5 Geo. III. in England, a lease of Incorporeal hereditaments may be granted by Ecclesiastical persons, and successor may bring an action of debt.

had been subject, particularly as it left the leases and grants made by Archbishops and Bishops, if confirmed by the Dean and Chapter, however long and unreasonable, good as they were before by the Common Law. The *disabling* statute therefore was passed, *made entirely for the benefit of the successor*, which enacts, That all grants of Archbishops and Bishops, even though confirmed by the Dean and Chapter, other than for the term of twenty-one years or three lives from the making, or without reserving the usual rent shall be void (83).

The Common Law still remained unaltered in Ireland (84), and the Church in that kingdom subject to all the waste and alienation arising from the original unlimited or ill restrained power of selling and leasing vested in the Ecclesiastical corporations.

The Canons of 1634 in that kingdom interposed, and by the 26th Canon it is ordained that no Archbishop, Bishop, Dean and Chapter, or Dignitary shall in any wise diminish the ancient

(83) This statute being entirely disabling, Parsons and Vicars remained under the same incapacity as before, of making leases without confirmation of the Patron and Ordinary.

(84) Some of the long leases made for hundreds of years

cient r
alienate
woods,
to their
cumben

This
by the I
is inten
bling sta
correct
what sh
Parsons

By th
the pres
out det
ed, Tha
alienatio
cumbran
shops, B
cons, P
ries Ecc
vernors

years by
by statute
instance in

(85) T
recited tot

(86) T

cient revenues of their Sees or Churches, nor alienate their *lands in fee farm*, nor destroy their woods, nor demise their mensal lands unless, it be to their resident Curates during their own incumbency, nor join in improper confirmations.

This Canon was followed up about a year after by the Irish statute 10 and 11 Ch. I. ch. 3. which is intended to include both the *enabling* and *disabling* statutes of England, but is drawn in an incorrect manner, as will sufficiently appear from what shall be presently observed as to leases by *Parsons* and *Vicars*.

By this act, (which purports to be made for the preservation of Ecclesiastical Property, without detriment, spoil, or prejudice) it is enacted, That all feoffments, gifts, grants and leases, alienations, conveyances, estates, charges and incumbrances, by any of the said (85) Archbishops, Bishops, Deans and Chapters, Archdeacons, Prebendaries or other the said Dignitaries Ecclesiastical, *Parsons*, *Vicars*, Masters Governors and Fellows of Colleges (86), and Masters,

years by Ecclesiastics previous to the disability imposed by statute law still remain in Ireland. I know one instance in the County of Downe.

(85) *The said*, because they are in the preamble before recited *totidem verbis*.

(86) The spelling of the time.

ters, Guardians, or other Governors of Hospitals or any of them, of any manors, lands, tenements, or other hereditaments, being any parcel of the possessions, of such persons, colleges, or hospitals, or any ways belonging to the same, or to any of them, (*other than the leases and grants in this act expressed and authorised* (87) shall be utterly void.

Then follows a *proviso*, containing the exceptions above alluded to, viz. that it shall be lawful for all and every the said Archbishops, Bishops, *Deans*, Deans and Chapters, Archdeacons, Prebendaries, and other the said Dignitaries Ecclesiastical (88) and likewise unto and for

(87) Or as the statute goes on to say, *in any other act made or to be made* in this present parliament; but there is no such other act, except that as to non residence.

(88) The incorrectness above mentioned is here evident, for in the enacting part *Deans*, were not solely and apart from the chapter, mentioned, here they are—in the enacting part *Parsons* and *Vicars* were inserted; here they are omitted.

This omission of Parsons and Vicars in the *proviso*, has occasioned a notable difficulty or question as to leases made by them, E. G. not long since a case arose as to a *lease* made by a Vicar, (of a garden which was a curtilage to his Vicarage house,) for twenty-one years, whether it were void or not. On this occasion the following opinion was given:

“ By

for the
lows of
offices
their w
feals of
their re
other h
tive chu
ing hou
last pass
tations,
and ther
ly used a
of *twenty*

“ By
“ corpora
“ beyond
“ the nec
“ ty-one y
“ Vicars.
“ Law, a
“ abling,
“ actly as
“ In Ir
“ 10 and
“ an opini
“ preamble
Vol. II.

for the said Masters, and Governors, and Fellows of Colleges and Hospitals to grant ancient offices accustomed to be granted, *and also* by their writing indented, under their respective seals of office (a counterpart to be entered in their register books) to demise any the land or other hereditaments, belonging to their respective churches, colleges, and hospitals, (the dwelling houses for the most part of forty years then last past used for any of their respective habitations, and demesne lands thereunto belonging, and therewithal during the said time, commonly used and occupied, only *excepted*) for the term of *twenty-one years*, whereof there is no other lease

“ By the Common Law leases made by any sole
“ corporation without confirmation, could not extend
“ beyond their lives. The enabling statute took away
“ the necessity of such confirmation in leases for twenty-one years or three lives, except as to Rectors and
“ Vicars. They therefore remained as at Common
“ Law, and the disabling statute being wholly disabling, it is certain that in England they remain exactly as they were at Common Law in this respect.

“ In Ireland the puzzled formation of the statute
“ 10 and 11 Char. I. makes it extremely difficult to form
“ an opinion. It is both enabling and disabling; in its
“ preamble it mentions Rectors and Vicars, it doth so also

VOL. II.

3 N

“ in

lease or estate in being which shall not expire in one year,—so much rent to be reserved at the peril of the lessees, as the moiety of the true value of the premises at or immediately before the time of making such lease shall amount unto,—and no privilege to the lessees or assignees to commit waste.

The act then proceeds to make three remarkable exceptions to its restrictions. First, as to leases of ground fit for building of castles and

“ in its disabling part which precedes the enabling; but
 “ in the enabling part, which is done by way of proviso
 “ and exception, it omits them: Yet in a late statute 35
 “ Geo. III. made to amend this act, they are con-
 “ sidered and spoken of as if included in this whole act.

“ Under such puzzled circumstances it is impossible to
 “ give a positive opinion, and there seems no method of
 “ settling the law but by getting some decision upon it.

“ However I am inclined to think that the Irish Legi-
 “ slature must have had the same intentions with the Eng-
 “ lish, and did not mean to give to Rectors and Vicars
 “ the privilege of making leases without confirmation,
 “ and so is the *letter* of the act.

“ Under the exception in *this* act, the lease cannot be
 “ maintained, as the garden is stated to be a curtilage be-
 “ longing to the house; nor under the act 1 Geo. II. ch.
 “ 15. for the requisites in that act have not been per-
 “ formed.”

fortresses,

fortress
 twenty
 confide
 in bein
 years;
 at the
 tilages
 or mark
 not of
 or of a
 tilages,

This
 larged
 enacts t
 porate,
 may den
 above *fi*
 (without
 to him o
 bishop o
 for his re

(89) To
 of this fan
 minute and
pro re nata,
 terms than
 Bishops de

fortreffes, which may be for a longer term than twenty-one years; secondly, of leases made in consideration of the surrender of long leases then in being which might for that turn be for *sixty* years; and thirdly, (which is the most material at the present day) of houses and their curtilages situate within any city, town corporate, or market town, *for forty years*, so as the same be not of any of their mansion or dwelling houses, or of any part thereof, or of any of the curtilages, gardens, or orchards belonging thereto.

This last and most material exception is enlarged by the stat. 1 Geo. II. ch. 15. which enacts that an Incumbent in a city or town corporate, with consent of the Patron or Ordinary, may demise ground therein, for any term not above *sixty-one* years, at the full improved rent, (without fine and not in futuro) to be reserved to him or his successors, if certified by the Archbishop or Bishop to be above what is sufficient for his residence (89).

The

(89) To these *grand* exceptions from the provisions of this famous statute, we must, add a great number of minute and limited ones, which the legislature has added *pro re nata*, such as that leases as may be made for longer terms than twenty-one years of bog and fen part of Bishops demesne, with certain consents, viz. for six-

The effect of *voluntary non-residence* upon Ecclesiastical

ty years; of other parts of the demefne, over and above two hundred and fifty acres, viz. for forty years. So of ground for houses of industry, for mills, common markets, light houses, mines and quarries, of school lands*, of lands purchased in lieu of those given to widen streets, with many others, so numerous that the statute book must be consulted for them. And as the legislature has added to the exceptions, and thereby extended the power of leasing, so has it on the other hand sometimes added to the restrictions, and thereby diminished that power, particularly with respect to

LEASES OF GLEBES AND TITHES,

On which it seems to have been understood in Ireland, that there was no more restraint by the statute originally than upon any other hereditaments, that is, that they could be leased for twenty-one years, in all cases, tho' in England so great a doubt arose whether *tithes* came within the statute on account of their being an incorporeal hereditament that though in Bacon's Abridgement, that doubt is said to be overruled, yet so late as the 5th of Geo. III. ch. 17. the legislature in England thought it necessary to clear it up, by declaring that leases of tithes, tolls, or other incorporeal hereditaments by Spiritual persons for three lives or twenty-one years, should be good.

In Ireland, as I have said, it seems always to have

* See 21 and 22 Geo. III. ch. 28.

ecclesiastical leases has been already touched upon (90). It is set forth in the 10th and 11th Char. I. ch. 2. which enacts that all gifts, grants, alienations, *leases*, charges and incumbrances (91) imposed

been understood that tithes came within the statute, as well as glebes, and therefore as the legislature limited the power of leasing glebes by declaring in statute 10 Wm. III. ch. 6. that no glebe fit or convenient for building, or built or to be built upon, or convenient to a house so built or to be built, should be aliened or demised for more than one year, so as to *tithes* it was enacted by statute 6 Geo. I. ch. 14. (after observing that doubts had arisen whether non residence affected leases made by Deans, Archdeacons, Dignitaries and Prebends, the corps of whose preferment consisted of one or more parishes, without any vicarage endowed), that no leases of tithes by them should be good for longer term than their incumbency, and the act extends the same restriction to all leases of tithes made by any Dignitary or Prebendary, or any Ecclesiastical person being Rector of a parish wherein there is a vicarage endowed, except where such tithes had been set in lease for the greatest part of thirty years then last past. Under leases of tithes to any but the occupiers of the ground, void by the last compensation act, 39 Geo. III.

(90) *Ante* page 276.

(91) It has been already hinted, that a point was made not many years since, I believe at Maryborough assizes, and saved, whether tithe notes passed to a non resident were valid. Surely the act is neither thinking

imposed or suffered by any Parson, Vicar or Beneficer of any benefice, with cure of souls, of or upon his said benefice, or of or upon any part thereof, shall be effectual and stand in force for such time only as he shall be resident upon his said benefice, without absence from the same above eighty days (92) in any one year and for no longer time, and all covenants, bonds, and assurances for enjoying his houses, lands, tithes for a longer time shall be void, and all bonds, to compel such Beneficer to resign (93), or to compel him to be resident, in order to enforce such incumbrances shall be void.

ing nor speaking of them, though it says plainly that leases to tithe farmers shall be avoided by non residence.

(92) Though the days be at several times, as ten days at one time, and twenty days at another time until eighty days, this is non residence of eighty days within the statute, but it is not every absence which avoids a lease; sickness, suspension, coercion is an excuse, and surely absence on necessary and inevitable business, allowed by the Bishop, ought to be a reasonable excuse; the lease is not void ab initio.

(93) It must be understood, in case he does not reside, otherwise this would be declaring by statute law, that all resignation bonds are void.

A doubt having arisen whether dignities and prebends came within the act, it was enacted by 6 Geo. I. ch. 14. that no lease of their tithes should be good for longer term than incumbency, but nothing said of glebes.

These

These statutes subject to the exceptions before mentioned continued to be the great governing law of the land till the reign of the present King. The law as to non residence is not altered, but by the statute 35 Geo. III. ch. 23 a most material alteration has been made in the 10th and 11th Char. III.

It must have been observed that the Irish Law on this head differed from the English in three material respects, viz. that in Ireland the lease can *only* be *for twenty-one years*, and not for *three lives*, the second that a *moiety of the true value* (94) at the time of the making was to be reserved; the third that the lands need not be *accustomably letten*. The first and third remain unaltered, the second has been altered by 15 Geo. III. in manner following.

This last act enacts that the rent reserved, need not be a moiety of the true value, so it be not less than was reserved for twenty years before. And leases theretofore made (in other respects legal) are thereby confirmed, though half value be not reserved, if in like manner,

(94) This by the act of Charles was to be ascertained, if it be questioned by verdict of Jury or certificate of Commissioners. But the latter mode repealed by 11 Geo. II. ch. 15. which last mentioned act also requires that the leases should be *filed* in the Registry by lessor.

although

the rent be not less than for twenty years, and although more than one year of the former lease were unexpired at the making; and what was formerly held under one lease if afterwards let under several leases good, if the sum of the rents be not less than before; but not to authorise concurrent leases otherwise than as before this act (95).

This act was made in some measure to appease and divert an urgent cry then raised, as it had often been before, for granting to Bishops and Colleges, a power to make long leases. In opposing this wish, the Bishops evidently opposed their own personal and private interests for the sake of their successors and of the Church. And without entering into the question as to the utility or propriety of such leases, to their honour be it spoken, that to my certain knowledge, great and immediate advantages were by

(95) This law making so material a change in the restrictions on Ecclesiastical leases, is set forth at large in the Appendix to the first volume of this work. Whether Bishops and their tenants have made much use of it, I know not. The College of Dublin has not, nor indeed it is very material to them or their tenants, for they have always reserved a real moiety of the value, according to regular valuations made by skilful surveyors.

them

them
gally h

Nor

not alt

has bee

scurely

more i

is said

in the

it may

such a

To t

pose suc

Crown

this and

ly had

tions, r

tween C

historica

the dow

ing kin

Church,

than a

one foll

ry, wha

position

should b

could ch

VOL.

them relinquished, which would fairly and legally have followed the passing of such a law.

Nor can I here avoid taking notice of a hint, not altogether removed from a menace, which has been upon that and other occasions not obscurely thrown out.—That if the laity be not more interested than they are, (and which it is said such a law would occasion them to be) in the support of the Episcopal establishment, it may upon some day or other feel the want of such a prop and outwork.

To this I answer that it is impossible to suppose such absurdity either in the advisers of the Crown or in the landholders as could endanger this ancient and revered establishment. Scarcely had the press ceased to teem with publications, ridiculing the necessary connection between Church and state, contrary to our own historical experience in these countries, when the downfall of the Monarchy in a neighbouring kingdom heaped upon the ruins of the Church, spoke to princes in a voice stronger than a million of arguments, how constantly one follows the other. And as to the tenantry, what could they expect on such a supposition but to change their landlord, (for I should be glad to know on what pretence they could claim the fee simple of the lands, or

what government would be so silly to let them do so), and then let me ask, would they gain or lose by the change? But admitting such wild suppositions which it would neither be decent or rational to make, were they not daily forced into modern conversation, Do they expect that lands held by the Crown or any private person would be demised to them on condition of paying only ten pounds for every hundred and fifty pounds which they receive, a proportion which I positively assert in many instances, now to exist in Ecclesiastical demises.

I have now finished this selection of such points of Ecclesiastical Law, interesting to the Clergy, which most frequently occur, or which seem to have been misconceived or imperfectly understood. It is my hope that it will be found useful: want of repose from more active life, with other reasons formerly premised, must be my apology for not rendering it more extensive,

APPENDIX.

OF SOME
IN THE
TY OF
JUDG
SINCE

A. died
ing a Fa
but died
Executors

Questio
should ha

APPENDIX

No. I.

NOTES

OF SOME CASES AND POINTS DETERMINED
IN THE ECCLESIASTICAL AND ADMIRAL-
TY COURTS IN IRELAND, AND *DICTA* OF
JUDGES ON POINTS OF PRACTICE THEREIN,
SINCE THE YEAR 1785.

Watkins & Watkins.

In the Court of Prerogative, 1786.

A. died intestate, possessed of personal property, leaving a Father and a Brother. The Father made a will but died without administering to his Son. Father's Executors were entitled to the beneficial interest.

Question arose between them and the Brother, who should have Administration to the Intestate.

a

Dr.

Dr. Smyth and Dr. Browne for the Executors.

Drs. Duigenan, Egan, and Vavafor for the Brother.

Tuesday, July 14, 1786, Dr. Radcliffe decreed in favour of the Brother, the next of kin.

We argued that the Administration ought to go with the interest, and insisted on the analogy of a Residuary Legatee, who gets administration.

Dr. R. Where there is an intestacy in fact, administration must go to the next of kin, whatever becomes of the interest. It has not been rightly considered, on what footing the Residuary Legatee is entitled to administration. The present is an intestacy in fact: the case of a Residuary Legatee is an intestacy in law,—there being a will and no Executor or a renouncing Executor. By the Canon Law, where there is a Residuary Legatee, there is no intestacy, for where there are no Executors appointed, Residuary Legatee becomes an Executor by that Law, and so says Swinburne, part 4. sec. 4. No. 3.

All questions of granting administration, unless confined to *particular* purposes, are reducible to two.

1. Whether there has been an Intestacy.
2. To whom Administration ought to be granted.

There are two kinds of Intestacy *in fact* and *in law*. This distinction is taken, 9. Co. 40. A. Hensloes Case.

Stat.

Stat. 31. Edw. 3. extends only to Intestacy in fact.

Stat. H. 8. extends to both kinds of Intestacy, but relates merely to the case of a wife.

When you look into Henfloe's Case, you would think that under stat. Edw. 3. both kinds of Intestacy were included, but on looking into Plowden, in Greysbrook v. Fox, you will find that Intestacy *in law* is not included. The only question in Plowden was, whether Administration was to be granted, when there was any testamentary disposition. Ordinary in case of Intestacy in law granting Administration to Residuary Legatees, does not offend against stat. Edw. 3.

On the same reason that if no Executors, Residuary Legatee is an Executor, and there is no Intestacy in fact, so is he an Executor if they renounce. Courts indeed never grant probate to a Residuary Legatee, but letters of Administration, and that out of favour to him, in order to convey it to his representatives, *in which case alone they do attend to the interest*, for if he got probate and died intestate, administration de bonis non would go to the next of kin of Testator.

Though no residuum, Residuary Legatee has Administration, although no interest, 1 Ventris 219.

I know the opinions of Comyn, Sir Joseph Jekyll, and P. Williams are against me, but I cannot give up mine.

The argument of inconvenience, and danger of applying for Administration where there is no interest, in

order to betray a trust (though I cannot presume that a man will wantonly apply for that, from which he can derive no benefit *) has so much weight with me, that if the representatives of husband or father who died without taking out letters of administration to the wife or son applied (and no objection made by the next of kin), I would grant administration to them, but if next of kin applied after must repeal it.

Grace and Grace.

Dec. 19, 1788.

In this cause Dr. Radcliffe gave his opinion that exceptions to the persons ought to be put in and proved before publication. Exceptions to the sayings might after. He said there were two objections *at law*,—to competency and to credit; two *in that Court* to the persons and to the sayings; the first was both to competency and credit, the last to credit only, unless as far as competency might come in incidentally, E. G. if it appeared that the witness had perjured himself in his sayings in *that cause*. But he seemed to think that perjury in *another cause* ought not to be admitted as an objection under exceptions to the sayings; it must be made an exception to the person, and come in before publication.

Grace and Grace.

May 12, 1789.

One party A. put in exceptions, and also an addi-

* The learned Judge forgot the tale of the man who said give me but possession of the effects, make me Administrator, I ask no legacy.

tional

tional allegation; the other party B. excepted to the exceptions, and also excepted to certain articles in the allegation. A. contested B.'s exception negatively. B. erroneously waited for A. to take some step, on whom none was incumbent, for B. was to pray that his exception being the *last* should be discussed. A. was in error, for he contested B.'s exception negatively, whereas he ought to have contested its admissibility, i. e. instead of joining in Demurrer, he joined issue upon it.

Same Case.

After publication, an allegation was put in by consent, to which an exception was put in, issue joined on the exception, then an application was made for leave to add another article to that allegation. *Court*; it cannot be done without discussing the exceptions, or at least without paying the cost of them.

Anonymous. A Jactitation Cause.

Defence. That the marriage was by a Popish Priest, the parties being Protestants; suit dismissed for two reasons; 1st, Because the marriage was *void* and required no sentence. 2d, Because where there has been a marriage *de facto*, the Court will never punish for Jactitation.

In Jactitation, where collusion is suspected, the Court must have the oath of the party, that they are not married.

Office

Office v. Blair.

Blair put in a peremptory defensive matter. The party promoting the office, insisted that he could not in a cause of office. Court, *he can*.

A proxy was then demanded from the Proctor of office. Court, *no proxy is to be required from the Proctor of office*.

Maghan v. Flanagan.

Testamentary cause. Prom. died. Court. Proceed in his name. No occasion for a new citation. *Suits here do not abate*, except personal suits, *actiones personales*, as for defamation. A suit does not abate in this Court by the death of a party, after contest of suit, for then the Proctor is dominus litis, wherefore the pleadings say, *the party of A. B.* In this case a will had been lost or spoliated during the cause, a copy allowed to be proved.

Musgrave v. Musgrave.

Court. No causes are summary in this Court, being the Consistorial, but causes about granting administration, and defamation causes.

In matrimonial causes, you may alledge after publication, or at any time, especially new matter; *non-quam transit in rem Judicatam*.

Horan

A P P E N D I X.

Horan v. Field.

One will, in corroboration of the Testator's intentions expressed in another of a later date, allowed to be alledged after publication decreed; though the suit had been two years in Court, and though the will was within the knowledge of the party all that time, because *in scriptis non idem periculum fraudis*.

Evans v. Napier.

General Napier left two sisters, Mrs. Dorothea Napier, who died unmarried, and Mrs. Evans the Promovent. The Impugnant, Lord Napier set up a will said to be made in 1785, which the Promovent impeached,

The Promovent obtained sentence against said will in the Court of Prerogative, and the Impugnant appealing, the Promovent also succeeded in the Court of Delegates.

Upon this the Impugnant applied to the Court of Chancery for a Commission of Review which was refused.

Promovent then applied in Chancery, to have the papers and assets of deceased handed over to him, and upon that motion it appeared that Lord Napier had in the course of the suit in the Courts Ecclesiastical, in corroboration of the Testatrix's intentions, alledged another will made in 1779, and he insisted in opposition to the motion, that the decree against him had only gone

gone to an intestacy as to the will of 1785, and was no bar to a new suit as to the will of 1779, even supposing which was not conceded, that the will of 1779 had not been substantially and directly put in issue in the former cause and decided upon.

On the other hand it was insisted that when Dr. Radcliffe, the Judge of the Prerogative Court, was about to give sentence, an application had been made to him, by Impugnant, to defer his sentence to give time to institute a suit to establish the said will of 1779, and saying him not to decree a total intestacy—that he had accordingly given time, and no such suit being instituted, had then decreed a *total* intestacy, and granted administration to Mrs. Evans, and that no new suit could now be instituted to disturb her right.

The Promovent replied that the time given by Dr. Radcliffe was not for the purpose abovementioned, but to enable the Promovent, if he could, to shew cause why tho' the administration had been granted, it should not actually be sued out.

The Court of Chancery refused the motion, and Lord Napier afterwards established the will of 1779 in the Court of Prerogative, but there is an appeal from this last decree yet undecided.

Fea v. Fea.

Divorce obtained by the woman for cruelty—alimony decreed, afterwards the husband obtained a verdict in Court of

of Com
made to
the day
thing of
Council.
for divo
her with
taining
be to va
suit, yo

When
I never
taking o

I nev
pose to
the perf
was a m
last case
administ
reason th

I will
I cannot
fraud or
jure rep

Admin
tura, can
Vol. 1

of Common Law for adultery—then an application was made to the Ecclesiastical Court to rescind alimony from the day of obtaining the verdict. *Court.* I know nothing of the verdict, it might be obtained by collusion. *Council.* We apply because we have instituted a suit for divorce for adultery, but cannot find her to serve her with process. *Court.* That is not the mode of obtaining your present purpose. Your application should be to vary the former decree, and then it being the same suit, you might serve her Proctor.

Anonymous.

Dicta of the Court—administration.

Where an administration cause includes a matrimonial, I never will hear it summarily.—I do not insist on your taking out a Commission, but you must have terms assigned.

I never will grant an administration for a special purpose to a man entitled to general administration, unless the person to whom the applicant wants administration was a mere trustee, nor then if he made a will. In the last case the party applying or his substitute must take administration generally *cum testamento annexo*, but the reason shall be mentioned in the Registry Book.

I will not grant a joint administration pending suit. I cannot revoke an administration once granted but for fraud or error. All the next of kin must be cited, those *Jure representationis* of course like others.

Administrator pending suit can only sell *bona peritura*, cannot call in any debts but those in danger, or

that might be barred by state of limitation, is removable on complaint, and accountable in Chancery.

Cosgrave v. Crofton.

A. wanting to raise an administrator for the purposes of a suit in Chancery to B. who died testate, cites the next of kin of deceased to come in and take administration with the will annexed. *Court.* If it was to take administration only, their non appearance would be taken for a negative contest, but being with a will they must be pushed to excommunication.

A Legatee in a will must cite not only Executors but next of kin, and that though merely to raise a personal representative in Chancery. If they know not any next of kin, they must put up a public edict.

Hewetson v. Hewetson.

My Client next of kin contested a will. After issue joined, he by a special proxy confessed and admitted the will. The Executor in the will named who was impugnant in the cause, disavowed all proceedings, and renounced the Executorship. My Client applied at the hearing for administration with the will annexed.

Court. I cannot establish the will, the person whose business it was to establish it having disavowed all proceedings; nor can I grant administration generally to the next of kin, as it appears to me judicially, that there is an *alleged* will deposited in the office. Nor will I grant administration

administration to Promovent with that testament annexed which he once disputed; for that would be to leave a precedent for a trick to establish any fraudulent will without proof, by setting up a nominal party to alledge a will, then pretending to dispute it with him, and then coming in and confessing it. Let the will be now proved in special form.

Hartpole v. Slevin.

In this cause it was agreed, that a suit in Jactitation may be commenced merely for the purpose of perpetuating testimony, without afterwards proceeding to sentence.

Anonymous.

A suit here need never be instituted against legatees, but only against Executors, for they are trustees for the legatees. Upon circumstances the Court will sometimes grant administration *cum testamento annexo* to any legatee though the legacy be a small one, in preference to the next of kin.

Anonymous.

A wife instituted a suit for Divorce, on account of adultery in the husband. *Interim* alimony decreed. The husband afterwards pleaded cohabitation since the suit commenced, and condonation, on which issue was taken, and a special replication put in, explaining the circumstances. The wife wished also to urge subsequent adulteries. *Court.* That must be in a distinct suit. It was

urgedh at the wife had a great income *aliunde*. Court.
That is irrelative. Alimony is decreed according to the
husband's property, often as far as one-fourth of it. He
indeed may come in and shew that he is *lapsus facultatibus*.

Smyth v. Cusack.

P. Carney of Drogheda, 1st November, 1785, made the following will :

" In the Name of God, Amen. I *P. Carney* of the
" County of the Town of *Drogheda*, Merchant, give,
" devise and bequeath all my Property of every Nature
" and Kind whatsoever unto my Son *Richard Carney*, sub-
" ject however to the Payment of my Debts, and the Le-
" gacies hereinafter mentioned, that is to say, to my trust-
" ty Friend *William Smyth* One Thousand Pounds over
" and above the Salary remaining due to him by me ; to my
" Brother-in-Law *Joseph Fegan* One Thousand Pounds ; I
" devise and bequeath unto my Servant *Catherine Caldwell*
" one Annuity of Twenty Pounds a Year during her
" natural Life, provided she shall continually wait upon
" and take Care of my said Son *Richard*, as long as she
" shall think necessary, but not otherwise ; I desire my
" Executors may maintain, cloath and school my Son's little
" Attendant, *John Miller*, until he is fit to be bound to a
" Trade, and then to pay his Apprentice Fee : I desire my
" Executors may as soon as they can settle Accounts
" with Mr. *Pierce Archbold*, and receive the Money due
" by him to be applied with the rest of my Property
" for the Use of my said Son ; I desire that said *William*
" *Smyth* may live in my House and carry on my Trade as
" usual ;

"usual; I bequeath unto the said William Smyth a further
 "Sum of Five Hundred Pounds Sterling, to be paid by
 "him in Legacies to such Persons as he shall think fit: And
 "if my said Son shall happen to die before he arrives at the
 "age of Twenty-one Years, In that Case I bequeath a fur-
 "ther Sum of Five Hundred Pounds to the said Joseph
 "Fegan, and in such Case Five Hundred Pounds to the
 "Reverend John Carney, and the Remainder of my said
 "Son's Fortune to said William Smyth, to be distributed
 "by him amongst my own Kindred, in such Shares and
 "Proportions as he shall think proper; I give and bequeath
 "to Robert Caddle of Herbert's-Town in the County of
 "Meath, Esq. Twenty Guineas to buy Mourning and a
 "Ring, and I do appoint him sole Guardian of my said
 "Son, having the highest Opinion of his Worth and
 "Integrity, and having no Doubt but he will apply his
 "friendly Care to my said Son's Welfare; And lastly,
 "I do appoint the said William Smyth and Joseph Fegan
 "my Executors, and declare this only to be my last
 "Will and Testament."

Every legal requisite to the will was proved; it did
 not appear however to have been read to or by the Tes-
 tator, and was made *in extremis*. The sentence of the
 Court expunged the part of the will printed above *in*
Italics, and established the rest.

It appeared to me that the clue which directed the
 Court was the declarations of the Testator while living.
 Though the Judge considered the will as legally proved,
 he thought it was attended with some circumstances of
 suspicion,

suspicion, and therefore that the Court was at liberty to establish such parts as were consonant to the uniform declarations of the Testator, and was at liberty to expunge those upon which he never had been heard to express any determination or intention.

From this sentence both parties appealed, and applied for a Commission of Delegates. Cusack in the first instance who obtained one—then Smyth who was refused. In applying for Smyth we insisted, that we were right on the authority of Maranta, p. 416.—that all that the Delegates could do for us in the Commission obtained by Cusack, was to refuse to expunge the part established by Dr. Radcliffe, but that they could not remedy the grievance complained of by us, by establishing the other part,—and that it was a sentence consisting of divers *Capitula*, and therefore we must have distinct appeals; as is the case, if a Decree be made in favour of one party, and yet from some laches or default in that successful party, costs given to the other. Dr. Smith. You might have all this benefit by adhering to our appeal; there is an instrument of *adhesion* in books of precedents.

The Chancellor said this was not a sentence consisting of divers *Capitula*, in the sense meant by Maranta, and refused distinct appeals.

The appeal then proceeded, and the Delegates having reversed the decree of the Court below, we applied to the Register of the Prerogative to send up the will, that they might grant probate upon it—he refused*; we then applied

* His objection seemed to be on the very point we apprehended.—

That

applied f
by the l
granted

Ecclesi
cuted by
the prin
quotes Y
a Vicar
Law sub
vicarium
delegated
Vol. IV.

Plaint
ed to fet
goes into
who say
administ
poses of
tator, w

That now
before esta
having no
or at all e
the Court
only of th
legates.

applied for an attested copy, which was given and attested by the Register of the Delegates, and upon that they granted us probate.

Surrogates.

Ecclesiastical jurisdiction in judicial acts may be executed by a substitute, but in law they are the acts of the principal that deposes or substitutes. Ayliffe, 163. quotes Year Book 11 H. 4. b. 4. a. 7. It is true that a Vicar or Delegated Power could not by the Canon Law substitute another in his place, *Vicarius non habet vicarium*, but the jurisdiction of *official principal* is not a delegated but an ordinary one. See Reeves's History, Vol. IV. p. 6. and *ante*. p. 12. ch. 1.

Reilly v. —

Plaintiff in Chancery, as a legatee under a will, wanted to set up an administrator for a special purpose. He goes into the Prerogative and cites only the Executors, who say they have renounced. He then offers to take administration with the will annexed, merely for the purposes of a Chancery suit. The next of kin to the Testator, who was Defendant in Chancery, though he had

That now matters were inverted, that they had established the part before established, and therefore had so far *affirmed* the decree, but having no authority over the part expunged that remained as before; or at all events it was *affirmed in part*, and therefore we must go to the Court below, which was determined as before to give us probate only of the one part, insisting that such was the meaning of the Delegates.

only

only a legacy of five shillings under the will, objected. *Court.* The next of kin must be cited and made regular parties to the suit, and the will proved. Otherwise suppose a will forged, by collusion with the pretended Executors named therein and they renouncing, administration might be had without the next of kin ever hearing of it.

Powell v. Stratford.

At the hearing, Impugnant applied for leave to alledge written documents, in order to get the personal answer of the Adversary. *Court.* You may exhibit written documents at the hearing with leave, such as the records of a Court of Law or Equity, and you may get the personal answer at any time to your allegations already put in, but shew me a precedent of such an application as this.—One or two were mentioned from the Register's Book, and it was said that the Delegates even examined lately *viva voce* at the hearing as to a forged will *. *Court.* Perhaps the Delegates may do things which this Court cannot; their power is the most summary, and *de plano*. The Impugnant afterwards withdrew the application, and no point was decided.

Uniacke v. Power.—An Intervenant.

In 1793, a lady made the will in question, in favour of Promovent; the fair Execution of it was not disputed. The Impugnant withdrew, and Power another of the next of kin intervened and alledged that the will was revoked.

* In the case of Burn v. Macfarland.

There

Ther
having
Promov
personal
it, decea
some co
a witne
her will.
into the
against
revocati
she said
Attorne
she give

The I
abused b
had defe
that she
foolish
her will
death in
lope sup
he infist
a duplic
as she d
and that
fore her
of a frie
and on a

VOL.

There was no evidence of any duplicate of this will having been executed, except that one witness swore Promovent told him there was, which Promovent in his personal answer denied. Some time after the execution of it, deceased expressed herself offended at Promovent about some conduct relative to some debentures. She desired a witness to go to Promovent's Mother's house, and get her will. He did, and brought it to her—she threw it into the fire, expressing resentment at the same time against Promovent. The Impugnant insisted this was a revocation; he also proved that the day before her death she said she wanted to settle her affairs, and sent for an Attorney to draw her will, but it was not done, nor did she give any reason for postponing it.

The Promovent on the other hand proved, that when abused by a third person about said debentures, Testatrix had defended him. Then when she was told of a report that she had destroyed her will, she said the reporter was a foolish boy, and pointed to a trunk in which she said her will was—that the present will was found after her death in said trunk among her valuable papers, in an envelope superscribed in her hand writing *this is my will*; and he insisted that supposing the will destroyed was really a duplicate of the present, it was done only in terrorem, as she did not destroy the part always in her possession, and that her pretended wish to make a will the day before her death, was only to get rid of the importunity of a friend of intervenients. The will was set aside, and on appeal the sentence confirmed by the Delegates.

Drapes v. Drapes.

The husband instituted a suit for a divorce for adultery—the wife instituted a *distinct* suit for a divorce *propter sevitiam*. The Judge decreed that publication should stop in the first suit, until the other was ready for publication, that they might come on together; *erroneously*, for they were not cross causes or connected—to connect them thus together, the wife should not have instituted a *distinct* suit, but reconvened the husband, or put in a reconventional matter in the former suit.

Moriarty v. Moriarty.

The Promovent alledging that he was married to the Impugnant, they being both subjects of Ireland, since the French Revolution, at Paris, by a Justice of Peace, according to the new constitution of France—that they were both Roman Catholics, and cohabited together as man and wife, and were afterwards married by a Roman Catholic Priest in holy orders, and that his wife had left him, instituted a suit for restitution of conjugal rights, to which she never appeared.

The alledged wife at the same time instituted a suit for Jactitation. To the libel in this last suit the alledged husband put in a negative contest instead of what he ought to have done, a justificatory matter, i. e. he denied the Jactitation, instead of justifying it.

The

The
a matter
averm
tution
the lady
tor; an
demand
cause, i.
the refu
matter
should a
thereto,
ance by
her; an
her, an
whereas
without
in, as f
missed,
no meth
conjugal
the pro
non-app
tit. 199.
on), wo

To m
the part

* Accor
page 98, a
cated instan

The only way to folve this error was to put in also a matter contrary and defensive, containing the same averments which were advanced in the cause for restitution of conjugal rights, and demand the answer of the lady who at that time lay concealed, or of her Proctor; and if she contested it negatively, go to proof or demand her personal answer. The Defendant in that cause, i. e. the husband so proceeded, and rightly, for if she refused to join issue upon his pleadings, viz. On the matter contrary and defensive, or having so joined issue, should afterwards refuse to give in her personal answer thereto, she might be excommunicated, her appearance by a Proctor giving the Court jurisdiction over her; and then a citation *to all effects** would issue against her, and he might go on with proofs and to hearing; whereas if the cause was heard in its present state, without such matter contrary and defensive being put in, as she had made no proofs, her libel would be dismissed, and she out of Court, and then he would have no method but to proceed in his suit for restitution of conjugal rights, in which she had never appeared, and the process in that suit for excommunicating her for non-appearance, which may be found in 1 Oughton, tit. 199. (and until after which that suit could not go on), would have been tedious and expensive.

In a Matrimonial cause.

To make the acknowledgement of the marriage by the parties and their cohabitation a *semplena probatio* of

* According to this case therefore, the saying which I mentioned in page 98, as to the party under such circumstances being excommunicated instantly, cannot be founded.

the marriage, in a suit between the parties themselves, there ought be two witnesses at the least to those facts; which if they can be procured, or one witness present at the actual marriage, the party must be admitted to the suppletory oath.

Though publication has passed, witnesses may be examined in this cause, for matrimonial suits have this peculiar privilege, that examination of witnesses is not precluded by publication. See 1 Oughton, Ordo. Jud. tit. 205.

A marriage under the new constitution of France by a justice of peace or municipal officer, would not be deemed a marriage in this country (though it might a contract) for it is not according to the *lex loci*, we not acknowledging the present legislation to be the legal power of the country.

Ryan v. Ryan.

Captain Ryan, an officer in the army, when about to be married to the Impugnant, met with objections on her part, on account of a report that he had been married to another. He, admitting that the present Promovent a woman in very low situation had pretended a marriage, produced a sentence of the Diocesan Court of Ossory in a suit in which the said Promovent had come in and confessed that there was no such marriage, whereupon the said sentence was founded. The present Impugnant relying on the opinion of a very eminent law-

yer

yer *,
confer
tain I
sent f
in by
the C
senten
the fo
Irish,
against

A.
in Ire
tors, a
the opi
of the
from t
that b
tled to
it. H
mandar
ed it.

Exce
Irish sta

* After

yer *, that this sentence was to her sufficient security, consented to the marriage and had issue thereof. Captain Ryan died, and the first wife claimed in the present suit administration to him. The Impugnant put in by way of peremptory exception, the sentence in the Court of Offory as a bar. It was overruled, for no sentence of nullity of matrimony is to be given upon the sole confession of the parties, by the 53rd Canon *Irish*, and the claim of the Promovent was established against the unfortunate Impugnant and her children.

The King *v.* Judge of the Prerogative Court.

In King's Bench.

A. having property at Santa Cruz, in Antigua, and in Ireland, made a will, appointing several *local* Executors, according to the true construction of the will in the opinion of the Court of Prerogative. Thomson one of the Executors of the Santa Cruz property, came from thence to live and reside in Ireland, and insisted that by the true construction of the will he was entitled to administration of the effects here. Court refused it. He applied to the Court of King's Bench for a mandamus, who after some delay and doubt refused it.

Tythe Cause.

Exception peremptory that the petition founded on Irish stat. 1 Geo. III. did not alledge that the tythes were

* Afterwards in high judicial station, since deceased.

in any parish, or that the Claimant was Rector of any parish. The admissibility of the exception contested, i. e. a Joinder in Demurrer.—Exception overruled, it being for *form*, and the statute says there shall be no exception for want of form.

Administration Cause.

A. died intestate, leaving an aunt, and several first cousins the children of an uncle—the aunt takes all, for there is no representation beyond brothers and sister's children.

ADMIRALTY.

Corish v. the Murphy.

Promovent alledged that having advanced 99l. 4s. to Impugnant, who was the owner of one-half of the Vessel in this cause, *for the purchase of said moiety of said Vessel and for other purposes respecting the same, the said Impugnant executed a bottomry bond to him upon the body or hull of said Vessel, then lying in the port of Bristol,*
and

and to undertake a voyage from thence to Milford, and from Milford to Wexford, dated 11th February, 1795, upon the high seas and within the jurisdiction of the Court for repayment of said sum, and that it still remained due.

To this allegation or petition which followed the words of the bond precisely, Impugnant put in an exception, because it was not alledged that the money so advanced was for the repairs or use of the Ship, (the words *other purposes* being too vague and general), or that the repayment thereof was to depend upon any risk to be run by said Vessel in her intended voyage, *or that such repayment was to be made or depend on the event of the safe return thereof*, so that it did no where appear by the allegation, whether said bond were *in law a bottomry bond*, so as to give the Court jurisdiction.

I argued that there were two kinds of bottomry bonds described by Sir W. Blackstone, one truly so,—the other vulgarly so called, but only suable in a Court of Law.

That this was a bond merely depending upon the *risk* and not pledging the Vessel, that no words were found in it, which could be construed to pledge the Vessel.—That to pledge the Vessel, such express words as the following must be used: I, A. B. do bind the said Ship, with the freight, tackle and apparel of the same, as in the precedent, in Beawes, Vol. I. p. 139.—that even supposing the Vessel pledged, and that it was properly a bottomry bond, yet it did not follow that the Admiralty had jurisdiction

dition—that every hypothecation of a ship does not give the Admiralty jurisdiction, for if the Master hypothecate under seal before the voyage begins, it was admitted in *Menetone and Gibbons*, 3. Term Reports, that the Admiralty had not jurisdiction—so if he hypothecate but not for necessaries for the Ship—that if a contract be made even upon the sea, if not for a marine cause, it cannot be sued in the Court of Admiralty. Hobart 12. Bridgeman's Case. Bacon, Court of Admiralty. C.

That it must be a marine contract, and for a maritime cause; it doth not appear here to be either: Instances of bottomry bonds sued at law are frequent. Lev. 54. Siderfin 27. 2 Ch. Caf. 130. Ab. Eq. Ca. 372.

Action of debt on a bond for monies taken up on bottomry mentioned. Molloy, lib. 2. ch. 10. p. 129. Cro. Ja. 208. Sharpley v. — and see 1 Atkins 341.

Dandy v. Turner was a case of a part owner borrowing money on a bottomry bond, payable on the return of the Ship from the voyage.

A Sheriff may take a ship in execution like any other chattel—why not? And if part of a contract is triable at Common Law, and part by the Admiral Law, the Common shall be preferred, Hob. 212.

On the other side were quoted *Johnson v. Shippen*, 2 Raymond, 982. 2 Bla. 459. Molloy, lib. 2. Ch. II. f. 12. and for forms of bottomry bonds. 2 Newman,

480—
bottom
subje

The
thecat
Ship,
the hu
form o
ing of
usual f
under
it did
not pr
it did,
courts

This
vateer
condem
land.
in the
miralty
at the
menced
the Shi
in Lon

* It is
was deter

VOL.

480—481. and it was urged that it is not the *form* of a bottomry bond which varies the jurisdiction, but the *subject matter*.

The Court was of opinion that the Vessel was hypothecated, for the party run the risk on the hull of the Ship, and it would have been unnecessary to mention the hull or body of the Ship otherwise. That the mere form of the bottomry bond did not signify, if the meaning of the parties was clear, and that this was not an unusual form, there being in Wood's complete conveyancer under title *bond* a precedent very like to it—that where it did not appear where it was executed, the Court would not presume against its own jurisdiction, especially as if it did, the parties could not have the same remedy in courts of law, the sentence of this Court going *in rem*.

Pillans *v.* the Victoria.

This Vessel captured in 1779 by the Shillelagh Privateer Captain Pillans, and brought into Dublin, was condemned as Prize by the Court of Admiralty in Ireland. The Lords Commissioners of Appeal in England, in the year 1781, (the Irish being then only a Vice Admiralty Court), reversed the sentence, on the ground that at the time of the capture, hostilities had not commenced between Great Britain and Spain: and ordered the Ship and Cargo to be restored to certain Claimants in London, and gave costs but no damages. In 1788 *

* It is therefore that I insert the case, though the question of prize was determined so long before.

their Lordships were applied to, with a complaint that restitution was not fully made. It was decided that the Captors were answerable for any deficiency in the Ship, if it had been plundered, but for ware-house room of the Cargo, and such things; Captors were not answerable, no damages having been given. Sale of the Ship though decreed below, not having been made, Marshal of the Court was not entitled to any commission.

Parry and others v. the Peggy, Captain Gibson.

The Promovents had agreed for monthly wages, for a voyage to the West Indies. They worked on board the ship for some days in the harbour of Dublin; afterwards Mr. Maguire, the Owner of the Ship, having changed his mind determined to alter the voyage and to postpone the sailing of the Ship, whereupon the Seamen were dismissed without their wages, who now libelled against the Ship. As Surrogate of the Admiralty, I decreed for the Seamen on the reason of the thing, and the authority of Wells v. Osmond, 2 Shower, p. 238.

Murphy v. the James.

Mariners had engaged by the run from Liverpool to Dublin. Most severe storms in February 1799, drove the Vessel inevitably into Milford-haven, where she was necessarily detained by the weather 16 days. Mariners who engage by the run are not entitled to any extra wages on account of any such accidents, unless it be by some subsequent agreement. Their run money is considerably greater than it otherwise would be, because they take their chance of all such accidents.

Mitchel

Mitchell and others v. the Favourite Nanny.

This was a suit for Seaman's wages. William Grunderfon took defence and pleaded that he was Master and Owner of said Vessel, and that he had on the 8th of February 1793 agreed with the regulating Captain in the port of Dublin, who acted on the part of the Judges of the Admiralty, that she should be taken into the service of his Majesty, as a Tender—that she was so accordingly, and put under the command of a Lieutenant of the Navy, and that the Promovents knowing the premises entered with the said Lieutenant, and that therefore their wages were only demandable at the Navy Office of *England*, and suable and recoverable *only* in the High Court of Admiralty of *England*, and not in this kingdom, nor against the said Grunderfon.

To this we replied, that supposing, but not admitting the law to be as mentioned in the exception, that it was irrelative, because they entered with Grunderfon the Master of the Ship before she was hired for a Tender, *absque hoc* that they entered with the said Lieutenant. This fact being proved, the point of law was not decided.

— v. the Jenny of Pengelly.

The Promovent alledged, that he being a Merchant of Waterford had laden certain flour on board this Vessel, which as appeared by the bills of lading signed by him and Robert Davies, the Master of the Ship, the said Master contracted safely to deliver in Dublin, and

d 2.

that

that the said Master had been guilty of a breach of contract, the flour being embezzled, or not delivered.

The Impugnant put in a declinatory exception instead of an answer, in which he said that the contract was entered into within the body of a county within this realm, to wit, at the city of Waterford in the county of the said city; and that the said bills of lading were signed, and the said Ship was then lying, and the said flour delivered in the county of the said city of Waterford, and not upon the high seas, nor within the jurisdiction of the Court of Admiralty, and therefore he prayed right and justice, and that the Court would not take cognizance of the matter, and that his exception should be decreed valid with costs.

For the Promovent it was insisted, that by the famous articles 1632, (see Cro. Ch. 296. 3 edit.) it was settled that suits might be brought in the Admiralty for the breach of charter party, provided their existence was not disputed, (which is the case here), and provided the penalty if any was not sued for, and that a bill of lading differs from a charter party only in this, that the first is required and given for a single article or more laden on board a Ship that has sundry merchandize shipped for sundry accounts, whereas a charter party is a contract for the use and freighting of the whole Ship—but the same reason extends to both.—And that the old and absurd notion of *locality* superseding the *nature* of the contract, was long since exploded.

The

The A
and no p
l. 40.

This E
tured by
carried i
a neutral
rality the
wards re
and got
prietor v
where V
her unde
alleging
Briganti
condem
legally cl

There
distance
taken—
when a
tium an
also as
case of
ments a

The Admiralty in this case decreed for its jurisdiction, and no prohibition was applied for. See Roll. Ab. 530. l. 40.

Wood v. the Hannah.

1799.

This Brig, bound from Maryport to Dantzic, was captured by a French Privateer on the coast of Norway, and carried into Christian-sound in that kingdom, which is a neutral port; condemned as prize by a Court of Admiralty there, and sold to a neutral subject; she was afterwards repaired, so as almost to become a new Vessel, and got a new registry, and was sent by her new Proprietor with a cargo to the port of Belfast in Ireland, where Wood, of Maryport, her former owner seized her under a warrant of the Irish Court of Admiralty, alledging that the condemnation and sale of the said Brigantine or Vessel at Christian-sound was an illegal condemnation, and that the property was not thereby legally changed.

There was some question about the facts, as to the distance of the Vessel from the coast of Norway, when taken—more about the law, viz. as to the old question, when a Ship is said to be truly brought *infra presidia hostium* and the true interpretation of these terms, and also as to condemnations by neutral powers. (See the case of *Goss v. Withers*, 2 Burr. 683. but the arguments and authorities cannot be here adduced, because,

Adbuc sub judice lis.

Archer

Archer and others v. the Ann of Dundalk.

29th May, 1796.

Promovents filed their libel in the Court of Admiralty, stating that on the 8th of February preceding, they being in the harbour of Ardglafs, in the county of Down, on board a boat or smack called the Esther, of which they were the crew, observed the hull or body of a ship, at a considerable distance out at sea, drifting towards the North East.—That they sailed towards the ship, came up with her 12 miles distant from the shore, and found her to be the Ann of Dundalk, abandoned by her crew, and not a living creature on board. That they did every thing they could to protect the Vessel, which however had been previously plundered, and brought her to Skerries on the 9th of February. That when brought into the harbour of Skerries she was worth 300*l*.—that her cargo was worth 600*l*. and actually sold for 420*l*. And they prayed to be decreed to the Vessel and cargo, or such proportion thereof as the Court should please. The Admiralty was proceeding in this suit when stopped by the Consignors of the cargo of the Vessel moving for the following prohibition.

K. B. Motion for a prohibition to the Admiralty.

Glasfot v. Archer.

Easter, 1796.

Plaintiff, to whom the cargo of the said Ship Ann was consigned, filed a suggestion, stating that by the laws

laws of
for saving
to the m
more nei
Court of

That
of being
belonging
hibition,
the Esth
the said v
one Mr.
Defendan
paid him

Defen
they neve
received
to a great
tiff Glasf
bail in th

For th
before th
that was
Common
yet it doe
fary to e
utes spe

* See the

laws of this realm, the rewards which ought to be given for saving ships in danger of being wrecked, in proportion to the merits of the salvagers, are to be adjusted by two or more neighbouring justices, and are not cognizable by the Court of Admiralty*.

That the Ship *Ann* of Dundalk, being in danger of being wrecked, was saved by the crew of a wherry belonging to Skerries, assisted by the Defendants in prohibition, who were the crew of another vessel called the *Esther Smack*.—That they had given the crew of the said wherry a recompence, and had also settled with one Mr. Mulholland, who said he was authorised by Defendants in prohibition to settle for them, and had paid him 25*l.* accordingly.

Defendants made affidavit in answer, swearing that they never had so authorised Mulholland, and never had received any recompence,—that the cargo was insured to a great amount, and the insurance since paid to Plaintiff *Glascot*, and that said now Plaintiff had by giving bail in the Admiralty submitted to its jurisdiction.

For the Plaintiff in prohibition it was said, that tho' before the salvage acts the Admiralty had jurisdiction, that was now taken away. —That though Courts of Common Law could not be ousted but by express words, yet it does not appear to be so in other Courts, nor necessary to exclude *inferior* jurisdictions. That these statutes speak of ships in *danger* of being stranded or run

* See the Irish Salvage Laws, Vol. I. of this Work, p. 206.

on shore, which was the case here, and also of holding out false lights, and therefore must relate not merely to ships wrecked upon the shore, but must extend to a considerable distance therefrom. That they speak of plundering a ship in distress, therefore every ship in distress is by them within the jurisdiction of the Law Courts—and talk of causing a ship to be carried into port, must mean therefore a ship upon the high seas. A port or haven is within the body of the county, 4 Inst. 138. so is any place above low water mark, 4 Inst. 139. so is any coast, shore, or harbour, Mo. 892.

On the other side it was insisted that tho' wreck was not within the jurisdiction of the Admiralty, Flotsam and Derelict at sea certainly was.—That admitting that express words were not necessary to oust an inferior jurisdiction, the argument did not apply as this was a high and ancient Court, and that the parties had allowed the jurisdiction of the Court.

Cases cited were 2d Brownlow, 30. *Dike v. Brown*. 2 Lord Raymond, 835. Sir Lionel Jenkyns, Vol. I. p. 81. Beawes Lex Mercat. tit. Salvage. 1 Siderfin, 178. and numerous quotations as usual were made from 4th Instit. The matter was compromised by the advice of the Court.

Cafe of the Fly Sloop.

Three merchants of Belfast entered into a charter party, for the Fly Sloop. They freight her from Belfast to Malaga; she returned loaded with wine. The Captain
without

without
casks, a
trefs, an
feized.

The
condemn

The fl
the barre
A quere
the infur
ters nam
proceedi
ty, writ
to attach
or bill of

It was
might w
Master o
500l. wh
ty, or a
whole d
was wor
vifable t
institute
the char
be fold f
but for
might pr
VOL. I

without their knowledge, took wine on board in illegal casks, and also smuggled; and the ship, proving in distress, and having no coast cocket or licence on board, was seized.

The Commissioners of Appeal discharged the ship, condemned all the wine.

The ship had been insured, among other things against the barrettry or fraud of the Captain or crew, as is usual. A quere was made.—Could the freighters recover against the insurers, and they again in their return in the affreighters name against the Captain or Owner, and if so, what proceedings, whether by attachment from the Admiralty, writ of Justicies, or otherwise, and at whose suit, to attach the ship to answer either an action of damages or bill of costs?

It was the opinion of Council, that the affreighters might well support an action of covenant against the Master of the vessel on the charter party, for the sum of 500l. which was the penalty mentioned in the charter party, or a special action on the case against him for their whole damages, but as it was stated that the Master was worth nothing, they thought it would be most advisable to come upon the Vessel, and for that purpose institute a suit in the Admiralty Court against her on the charter party, not praying that the Vessel should be sold for the 500l. the penalty in the charter party, but for their damages in general, and in such suit they might procure a warrant of the Admiralty Court to ar-

rest the Ship. This was thought their only possible remedy, though not without risk of a prohibition if applied for. The advice was followed and succeeded.

Briggs *v.* the Perseverance, George Tetherly
Master.

Two Brigs, the Ann of Whitehaven, Joseph Briggs, Master and part Owner, and the Perseverance of Appledore—Tetherly, Master, encountered each other in the Irish Channel, on the 30th of May, 1795, in a very thick fog, and by the collision the Brig Ann was sunk, which was the origin and foundation of the present suit. The stroke was between and upon the larboard bows of each vessel.

It was agreed that the Perseverance was steering her course N. N. E. and the Ann hers S. S. W. with her starboard tacks on board; and with respect to the wind the parties differed only as far as one point, the Ann's crew insisting it was S. W. the Perseverance that it was S. W. by W.; it was not controverted that the wind was rather fresh; the Perseverance then going at the rate of seven knots an hour, the Ann at the rate of five,—and that the Perseverance was going nearly before the wind, or *going large*, and that the Ann was in the position called by seamen *close hauled*.

Briggs admitted that the fog was so thick, that his crew could not see the Perseverance until within 100 yards, but insisted that he was sailing into the fog, and
the

the Perseverance out, and brought evidence to prove that some of the Perseverance's crew had declared they saw the Ann ten minutes before the stroke, which was opposed by counter evidence that went also to prove that the fog was equally thick all around.

It was proved beyond controversy and not disputed, that of nine persons, which was the number on board each vessel, every one was upon deck in the Perseverance at the time of the stroke and some looking out forward,—whereas on board the Ann the Captain was in bed, and of the ordinary watch one was absent; and of the other three, one was at the helm and the remaining two intent upon splicing a rope and standing on the quarter-deck. The party of the Perseverance therefore accused the Ann of such gross negligence in not keeping a look out, as made them answerable for all the consequences.

Another grand question arose, as to what was the duty of each ship, after its crew saw the other. It was admitted that the rule of the Marine Law is, that the ship going *large* or before the wind, should give way to the ship going *close hauled*, or across the wind.

This rule the crew of the Perseverance insisted they obeyed by going to *lee*ward. The Ann's Captain insisted they ought to have gone *astern*. They answered they *did* in the true meaning of the term, and if any thing else was meant, it must be that they ought to have gone to *windward*, contrary to the universal rule.

It was insisted also by the *Perseverance's* crew, that they did their duty, in putting her helm *a port* or *hard a weather*, and in lowering their mainfail,—that the helm of the *Ann* ought to have been put *a lee*, (about which fact there was a contrariety of evidence) and her foresheet let go and jib hauled down, which if there had been a man forward might have been done in an instant, and would inevitably have prevented the collision; that these last steps were not taken Briggs did not deny, but said it would have been impossible in the time.

In a case fit only for a jury of Seamen, (and which the Impugnant earnestly urged the Promovent to have tried by a jury in London, where cases of that kind frequently occurred, and the assistance of a Master of the Trinity-house was often afforded to the Judge *at nisi prius*), the Judge of the Admiralty obtained the assistance of the senior Captain of the British Navy, Sir A. Schomberg who is resident in Dublin, as his assessor; and the parties added to the council, two gentlemen very respectable in the profession, and who had been in earlier life officers in the Navy, Mr. O'Dwyer and Mr. Barnes. The Assessor, high in character as a man and as a Seaman, was at first inclined to impugnants, but ultimately thought them wrong. The Judge (though, as he said, not for the reasons given by his skilful Assessor) decreed for the Promovents, and the decree was affirmed on appeal to Delegates by three Common Law Judges, but without specifically giving their reasons.

Briggs

Briggs

The
in the
though
In the
of *Ap*

The
verano
mover
in ord
Tethe
rant.
made
amenc
becau
Capt
decree
pond
fendar

Jun
July 5

The
that t
have
be for

Briggs v. Sir Annesly Stewart and Richard Williams.

The Defendants who were bail for the Perseverance in the case preceding, conceiving the decision a hard one, thought themselves entitled to take any legal advantage. In the stipulation they were bail for the Brig Perseverance of *Appledore*, *John Tetherly* Master.

The suit was erroneously instituted against the Perseverance of *Swanzy*, *George Tetherly* Master, and the Promovents, though informed of the mistake, persisted in it, in order, as was said, to deprive Impugnants of *George Tetherly's* evidence which would have been very important. This was sworn by Impugnants on an application made early in the cause to the Court of Admiralty to amend and alter these names, which that Court refused, because *George Tetherly* had been registered as nominal Captain to avoid impressing; the consequence was, the decree and monition in pursuance of it could not correspond with the stipulation entered into by the present Defendants.

June 28. A rule on the bail to bring forth the vessel.
July 5. Monition to the bail to pay debt and costs.

The bail paid no attention to these rules, conceiving that they were irregular, inasmuch as execution should have been against the Vessel, and then if she could not be found, a rule on the bail unless cause, just as at law

*

a scire

a *scire facias* doth not go against bail, until a *capias* against the principal be returned.

The bail however, an order having been made to attach them, appeared on October 21. and moved to set aside the proceedings for the reason above, and also because the monition was against the Brig Perseverance of *Appledore*, *George Tetherly* Master, and therefore not conformable to the stipulation, which was for the Brig Perseverance of *Swansea*, *John Tetherly* Master. *Rule.* Proceedings set aside with costs against the bail, and a new monition to issue conformable to the stipulation.

November 6. Commission of appraisement and sale to go against the vessel, and so much of the rule of the 21st of October, as related to the bail paying costs rescinded. November 11. The vessel not being to be found, the commission of appraisement and sale vacated. December 18. Ordered that the taxed costs, in the Court of Delegates be added to the monition, although we insisted that the bail never bound themselves to pay the costs of the appeal, but there should have been new bail as on writs of error in the law courts. See *Clark's Prax. Ad.* 5th Edition, note to p. 16.

1798. February. A monition having issued conformable to the stipulation, Dr. Browne moved the Court to set aside all the proceedings against the bail, as the monition (though now conformable to the stipulation) was not agreeable to or founded upon any sentence or cause existing in the Court, nor were the bail bound for the vessel against which a decree had been pronounced

in

in a cause entitled Joseph Briggs against the Perseverance of *Appledore*, *George Tetherly* Master, nor ever entered into any recognizance for the production of any such Vessel. The Motion was refused, and leave given to the Promovent to apply for permission to amend.

The Promovent accordingly on a subsequent day moved for leave to amend the *bail bond* by altering the word *Swansea* to *Appledore* and *John* to *George*; which we opposed on the ground, that it would be a most arbitrary, unlimited, and unprecedented exertion of authority to make a man bail for a ship or a person whom he never proffered to be bail for. That if any amendment were to have been made, it should have been when we applied in the beginning of the cause, in which case we should have had the benefit of *George Tetherly's* evidence; but to say that he shall be considered as the Master while the cause continued, so as to deprive us of his evidence, and that the stipulation should now be altered in order to get at the bail, would be a double injustice. That, however our defence might be *inter apices Juris*, it was one that Courts of Common Law had never presumed to dispise or to decide against. See 3 Lev. 235. —Mod. Ca. 309.—1 Salk. 102.—Moore 694. 407.—1 Mod. 5.—2 Jon. 188.—Cro. Eliz. 223 and 458. and the sayings of Lord Kenyon in *Owen v. Nail*. 6 Term Reports, p. 705. where he says, “ although we hear “ objections of this kind with some prejudice, yet we “ must take care, in our earnest desire to do justice, not “ to transgress the limits of the Law.

The Court gave leave to amend the stipulation, but an appeal has been brought.

Boulger

Boulger and others v. Ship Anne.

The Promovents *mariners* stated that the said ship of whose crew they had been, was wrecked on the 5th of October, 1795, on the coast of Norway; that Scallan the Captain had received a large sum of money the produce of the sale of the wreck, and that Seamen's wages were the first money that ought to be paid thereout. Scallan applied to the Court of King's Bench for a prohibition, after sentence had passed against him in the Admiralty, on four grounds, 1st, that it was a contract made on land; 2dly, though beyond seas, yet for payment of money at home, and the contract to be completed at home; 3rdly, that at the time of issuing the warrant, the said Scallan was not Master of any ship; 4thly, that the contract was special and also under seal.

The three first points had no weight, the last, if it had appeared *upon the face of the proceedings*, would, as it seemed, in the opinion of the Court on the authority of *Howe v. Napier*, 4 Burr. 1944 *. have been sufficient to obtain prohibition, but *after sentence*, nothing will avail which doth not appear on the proceedings. The party

* With great submission however the case of *Howe, v. Napier* as far as relates to contracts under seal ousting the Jurisdiction is contradictory to Lord Holt in his Reports p. 50. and is contradicted by Menetone and Gibbons, 3 Term Reports, but in truth the case of *Howe v. Napier* went on the conjoint circumstance of its being *under seal*, and also *Special*, and perhaps in reality upon the *latter* only.

here

here even acknowledged it was a matter *dehors* the proceedings, by supporting his suggestion by an affidavit, which, if it appeared upon them, would not have been necessary. Prohibition refused.

Lalor in Prohibition, K. B.

In the last case, the Court of Admiralty had attached Lalor for rescuing Scallan, who had been arrested by an Admiralty warrant. Lalor applied for a prohibition insisting that the Court of Admiralty has not jurisdiction or power to attach for contempts, unless committed in its sight and view. His council cited Vaughan, p. 1.

I argued that no court can support itself without a power of punishing contempts, and that it was an absurd distinction to say the Court could attach for assaulting an officer of the Court in its presence, but not if he was assaulted a yard from the door. To look therefore for authorities seemed superfluous, for to use the words of Judge Blackstone, laws without a competent authority to support their jurisdiction would be vain and nugatory; therefore the process of attachment must be as ancient as the courts themselves, 4 Black. Comm. p. 285. ch. 20.

It is objected it cannot attach in the present case, because it is not a Court of Record. That cannot be the principle, for so neither could it attach for contempts in its presence. The Court of Chancery is not a Court of Record, yet attachments were borrowed from it;

until sequestrations were invented its whole process was in nature of process of contempt.

It is said a Justice of Peace cannot fine but for contempts *in his presence*. To compare that office with this high Court of ancient jurisdiction is not a fair analogy. But what can the Justice do?—He can immediately upon information given to him of a rescue, issue his warrant and have the man taken up. The Ecclesiastical Court can excommunicate, but this Court would be helpless; for surely it will not be said, that this high Court is every moment to apply for aid to a Justice of Peace or a Court of Law, or else to desert its officer, and leave him if abused merely to his action.

I admit the case in Vaughan, p. 1. says, this Court may attach for contempts *in its presence*, and these words have been, perhaps carelessly, copied by Judge Blackstone in his Commentaries; but there are no *exclusive* words superadded.—It is no where said *directly* that the Court shall not attach for contempts committed at a distance, and I think 12 Mod. 246. and 1 Lord Raymond 446. Rigden v. Hedges, shew that it can.

I take the true and only distinction to be, that if the contempt be committed in the face of the Court the offender may be instantly punished without further examination, but in matters that arise at a distance there must be a rule to shew cause*; and Sir W. Blackstone

* The English Court of Admiralty I am informed makes an absolute rule at once, so that the party must appear in custody. Clarke's Praxis Adm. agrees with this.

admits

admits t
ch. 20. 1

Altho
tom of t
tion, 13
an attac
1 Roll.

Other
1 Term
Practice
and 27.

The C
but with

The F
Septemb
the Mast
fel a voy
to Dubl

That
nine day
was capt

* The C
as at prese
tion in thi

admits this is the distinction in the law courts, 4 Black. ch. 20. p. 285.

Although it be not a Court of Record, it may by custom of the Court amerce the Defendant at its discretion, 13 Rep. p. 53. and this is a warrant not properly an attachment. As to arresting the person here. See 1 Roll. Ab. 53. Godbolt 193. 3 Black. ch. 7. p. 109.

Other cases cited were, 1 Lev. 253. 1 Salk. 136. 1 Term Rep. 555. 3 Black. Comm. 113. 2 Sellon's Practice.—Horan *v.* Blacquiere. Palmer 422. Noy 77 and 27. Watkin's case, Latch 114.

The Court of King's Bench granted the prohibition, but without specially assigning their reasons *.

Harrison *v.* the George.

The Promovent stated by his libel that on the 20th of September 1796, he had been engaged by Joseph Toole the Master of the George, to go as Mate of said Vessel a voyage from Liverpool to Oporto, and from thence to Dublin, at the monthly wages of 5l. 2s. 4h.

That on the 22d, the Vessel sailed, and on the 29th, nine days after his hiring or engaging as aforesaid, she was captured by the Vengeur a French Privateer.

* The Court of King's Bench in Ireland never was so ably filled as at present, but I am told, from good authority, that the determination in this instance was not assented to in England.

That the said Joseph Toole, in order to regain the said Vessel for the Owners thereof, proposed a ransom of 300 guineas to the Master of said Privateer the Vengeur, and did accordingly ransom the said Brig the George for the said sum of 300 guineas; and in pursuance of said agreement a ransom bill was executed and Promovent was delivered up by said Joseph Toole to the said Master of the said Privateer as an hostage until said ransom money or 300 guineas should be paid, the Captain of the said Privateer refusing to deliver up said Vessel without such hostage, and promovent in consequence thereof was carried into Dunkirk in France where he now remains in close confinement, and the said Brig the George was then suffered to prosecute her voyage.

That at the time Promovent was delivered up an hostage as aforesaid, the said Joseph Toole then and there *promised to pay Promovent*, during such time as Petitioner should be in confinement for said ransom money and until Promovent should arrive at Dublin where said Vessel was bound, 10l. 4s. 9d. per month.

That the said Brig the George, her tackle apparel and furniture at the time of the said taking was worth the sum of 2400l. sterling.

That from said 20th day of September the time Promovent was hired to the 29th, being nine days, at the rate of 5l. 2s. 4hd. Promovent earned a sum of 1l. 10s. 9d. and from the said 29th, the time Promovent was delivered as an hostage to the 1st day of March, instant, during

during
for the
which
on by
as afo
ther w
52l. 14
and hi
which
1st day

That
to Op
dischar
said an
months
or his
Promov
Harriso
produc
by him
receive

That
trefs a
saries o
confine
receive

Tha

during which time Promovent has remained a prisoner for the said ransom money, is a period of 5 months, which at the rate of 10l. 4s. 9d. per month as agreed on by the said Joseph Toole to be paid to Promovent as aforesaid, makes a sum of 51l. 3s. 9d. which together with said sum of 11l. 10s. 9d. makes a sum of 62l. 14s. 6d. Irish, out of which Promovent by himself and his wife received a sum of 11l. 18s. 10hd. Irish, which leaves a balance due to Promovent on the said 1st day of March, amounting to 40l. 15s. 7hd.

That said Brig the George performed her said voyage to Oporto and arrived safe in the port of Dublin, has discharged the cargo she had taken in at Oporto aforesaid and has been in the harbour of Dublin these three months past, and Promovent has not as yet *been ransomed* or his said *balance of wages* paid him. Notwithstanding Promovent by several letters written by him to Mary Harrison Promovent's wife, which are now ready to be produced, and by a regular power of Attorney executed by him has authorized and impowered his said wife to receive said wages and give receipts for the same.

That Promovent is now reduced to the greatest distress and poverty, and in want of the common necessities of life, and his health is much impaired by his confinement and the severity of the treatment he has received thereby.

That said Brig or Vessel has been duly arrested, and
is

is now in the custody of the Marshal of this honourable Court, and so ended his libel.

For the Impugnant, I insisted that if this suit was for wages, it could not lie, since the Promovent admitted he was paid considerably more than the wages earned by him, from the time of his agreement in Liverpool to the day of the capture; and as to any subsequent time, he could not be entitled to any wages, since they were forfeited by the capture, even though the ship be ransomed afterwards, 2 Lord Raymond, 1212. *Wiggins v. Ingleton*; so if the ship perishes by tempest or fire, for otherwise the mariners would not use their best endeavours to save the ship. Molloy, Lib. 2. chap. 3. sect. 10. 2 Siderfin, 179.

If a ship perishes at sea they lose their wages, and the owners their freight; if she comes to her first delivering port, they have wages 'till then, if lost afterwards they lose their subsequent wages.

It is said, says Judge Buller, in *Yates and Hall*, 1 Term Rep. 79, that if the ship be ransomed, and proceed on her voyage, the sailors will be entitled to their wages. No authority, saith he, has been cited to support that position, and the general rule of law is, that if the ship be captured, the wages are lost. The ransom (continues that learned Judge) is a new purchase of the ship, and it will require great consideration before it is determined, that after a ransom the owners shall be liable to pay

pay w
captur

Sinc
must b
This
preten
the shi
exceed
was vo
54. fe
land, a

1st.
bound
are Jo
therefo
sonal p
by wha
tend to

2ly.
Master
upon w
tract o
merely
v. Coe
a Mast
here th
a mont
which a

pay wages even for the time which elapsed before the capture.

Since then this suit could not be said to be for wages, it must be founded on the Captains contract with Promovent. This I argued 1st. was a mere personal contract, not pretending to bind the ship. 2ly If it did affect to bind the ship, it was so far void, because that so it would much exceed the Captains powers. 3ly. That at all events it was void under the Irish Act 21 and 22, Geo. III. cap. 54. sect. 2. made in imitation of a similar one in England, against ransoming captured ships.

1st. The contract doth not mention the ship, it is not bound then by any exprefs words, the words of the libel are *Joseph Toole promised to pay Promovent*. It is stated therefore by the party himself, that it was only his *personal* promise—not a word of the ship, or of the owners, by what violent implication then is it here made to extend to the ship.

2ly. Suppose it be construed to extend to the ship, the Master or Captain had no such power. The principle upon which the law holds the owner liable for the contract of the Master, is, that the Master is considered merely as a servant to the owner. Molloy, 228. Rich v. Coe, Cowpers Rep. 636, now could a servant bind a Master to do that which is impossible or illegal, as is here the ransom; or disadvantageous, as to pay so much a month, for an indefinite time, until an act be done, which act is forbidden by the Law. But suppose that the
Promovent

Promovent could sue the owners in a Court of Law, on the Captains contract; how doth that entitle him to come upon their ship in this Court. The Master cannot hypothecate the ship whenever he chuses arbitrarily. It must be for the necessities of the ship while at sea, or in a foreign port; if he borrow money for the use of the ship before the voyage commenced, it doth not give the Admiralty Jurisdiction.—*Menetone v. Gibbons*, 3 Term Rep. 267, if the Master borrows money to repair the ship, when there is no occasion, he alone is personally debtor.—*Molloy*, 315; every contract even for the benefit of the owners doth not bind the ships, but surely a contract to pay 120l. a year, probably during Promovents life, where a ship was actually ensured, may be to them a most destructive bargain; but above all there is exprefs authority, that the Master cannot make the ship security for any persons redemption but his own.—*Molloy*, book 2. chap. 6. sect. 13. and so it was by the Rhodian Laws. See besides the cases already cited, 3 Burr. 1844. *Douglass* 539, *Abernethy v. Landale*, 1 Ventris 147, 12 Mod. 442, *West and West*.

3dly. I come now to the Irish Act 21 and 22 G. III. cap. 54. sect. 2. all contracts and agreements entered into, and bills, notes, and other securities given by any Master of a captured ship or vessel, or other on board or belonging, for ransom thereof, or of any merchandizes, or goods on board, shall be absolutely void and of no effect; how can this be evaded but by saying that this was not a contract for the ransom—not made with the captor—but

made

made
ment
look
be ex
ingto
the ex
be com
not w
groun
Pl. C

The
respect
ey.—A
—Sha
Ashe's

The
many a
justice
this wa
and not
replied
to see
Captain

The
wages
decreed
bel, wh
roneous.
Vol.

made with a third person ; in construing Acts of Parliament we are not to quibble—plain rules of construction ; look into the reason of the act. Every Statute ought to be expounded, not according to the letter, but according to the intent, 2 Rol. 318. Pl. Com. 350—363.—If the enacting words can take in the mischief, they shall be construed for that purpose, though the preamble does not warrant it. Basset and Basset, 3 Atk. 203. So the ground and cause of making a Statute explain the intent. Pl. Com. 173, 204.

The word *for* may mean—*Because of*—Hooker.—*With respect or regard to*—Stillingfleet.—*For the sake of*—Cowey.—*In search of*—Tillotson.—*In hope of*—*for the sake of*—Shakespeare.—*In regard of*—Addison.—*On account of*—Athe's Dictionary.

The Promovent's council opposed to this reasoning many and ingenious arguments, to which I could not do justice without possession of their notes, particularly that this was not a contract for ransom but collateral thereto, and not within the Act of Parliament ; to which it was replied that then by this kind of subterfuge, it was easy to see how without any actual agreement between the Captain and the Enemy, the act might be eluded.

The Court decreed for Promovent, and gave the wages up to the day of the decree, so that the sum decreed exceeded that mentioned and prayed in the libel, which the Impugnants council conceiving to be erroneous, for that and the other reasons above mentioned

VOL. II.

g

appealed

appealed, but the sentence was affirmed in the Delegates.

The Promovent then proceeded against the bail, not merely for the sum for which they had engaged by their stipulation, but for a much larger sum, viz. the whole sum decreed, and the bail having come in to shew cause why they should not pay a larger sum than that mentioned in the stipulation, the motion was refused, upon which they appealed, which appeal is still depending.

Commission of Adjuncts.

In *Pentland v. Mallie*, the Court of Delegates had been equally divided. Application was made to the Court of Chancery for a *Commission of Adjuncts*. The application being novel in this country, the Court desired it to be argued, which was done with great learning, and I am sorry that want of room forbids me to insert the arguments. The Court was soon satisfied that there could be no doubt of the propriety of the application (which applies equally to the Court of *Admiralty*) but the parties compromised.

Commission of Review.

* *Opinion given by a great English Advocate.*

His Majesty has a power of granting a Commission of Review after the sentence of the Delegates if he is advised so to do, but such a grant is mere matter of discretion, and by no means *ex Debito Justitiæ*; such grants

In *Evans v. Napier*.

have

have been rare at all times, and of latter years have been discountenanced to a degree that may be considered as amounting to a total extinction of the practice. The last case when it was applied for was in the case of Hoogskar-pel a prize cause. The history and nature of the prerogative of granting Commissions of Review was fully enquired into on that occasion, and the Court (in which Lord Camden presided), held that such a power was exercised by the sovereigns of countries in which the Civil Law and Canon Law were permitted to govern the tribunals either in whole or in part, such a power having taken its rise in the more corrupt ages of those systems of jurisprudence.—That this power having been anciently exercised in the Ecclesiastical tribunals of England by the Pope, devolved of course to the Crown, by virtue of the statutes which transferred the supremacy at the time of the reformation, at least that it had been so held upon an adjudged case where it was brought in question, though as Lord Camden observed upon very unsatisfactory grounds, that would hardly have led to such a judgment in later times against the positive language of statutes which declare the sentence of the Delegates to be final; that it was a prerogative not to be countenanced, being the growth of dark and despotic times and tending to introduce matter of favour into the regular administration of justice; Lord Camden added that he thought it likely that would be the last application that ever would be made for a Commission of Review, at least he would venture to say that such an application would never be successful.

No. II.

ADVICE TO STUDENTS OF CIVIL AND ECCLESIASTICAL LAW.

Read first the 5th chapter of the third volume of Blackstone's Commentaries to get a general view of the Ecclesiastical Courts, and then the Preface to Burn's Ecclesiastical Law, to shew more particularly by what Law they are governed.

I should then recommend a perusal of Justinian's Institutes, along with Heineccius' Comment thereon, attending chiefly to the parts more useful, to wit, those on marriages and wills. This will teach enough of the theory of the Civil Law for common purposes, and then to obtain a knowledge of the practice, Oughton's *Ordo Judiciorum*, and Cockburne's English Abridgment of it, under the name of the Clerks Assistant, must be resorted to; and the Student should not be without Gail or Maranta.

I should then recommend a diligent perusal of Burne and Bolinbroke's Ecclesiastical Laws; which, with an accurate acquaintance with the Canons and the Acts of Parliament in this Kingdom, relative to tithes, buildings, dilapidations and glebes, will afford sufficient knowledge for common purposes.

I think I may without vanity add, that this elementary treatise of mine will in its first Volume be useful as to theory, and in its second as to practice.

But

* * * *

But besides these modern studies, to the Ecclesiastical reader who recollects, that the Empire was Christian long before the days of Justinian, it will occur that there must be many provisions in the Roman Civil Law worthy of his notice; to such I would recommend, and it would not take up much time, the perusal of the six first titles of the Code and then of the second collation, “De non alienandis aut permutandis Ecclesiasticis rebus immobilibus, aut in specialem hypothecam dandis—and the fifth de Ecclesiasticarum rerum immobilium alienatione & solutione,”—in which he will find prohibitions of alienations similar to those existing formerly among us, with an exception of alienations to the crown.—And of the 2d collation, Nov. 9 “ut Ecclesia Romana centum annorum gaudeat præscriptione, where it appears that though the old maxim of *Nulum tempus occurrit Ecclesiæ* was not observed, yet the church was distinguished by that privilege, during one hundred years. He should then read the very curious Novellæ 131—132 and 133; the first of which treats of the ranks and privileges of the priesthood, orders the decrees of the four first councils of Nice, Constantinople, Ephesus and Chalcedon to be received with the same authority as the holy Scriptures, declares the Pope to be *primum Sacerdotum*, the Archbishop of Constantinople to be next to the holy Apostolical See of senior Rome and so in order,

order,—gives directions as to the building of churches, and takes away the power of testation from Bishops as to all property acquired after their consecration, making it merge in the bosom of the church. The second is *de interdicendis Collegiis hæreticorum*. The third shews, *Quod oporteat monachos vivere*. I next recommend the perusal of the 137th Novell *de ordinatione Episcoporum et Clericorum*, nor will it be unamusing to him to read the constitution of Leo *de Ecclesiasticorum alea ludentium pœna*, and that of Alexis Commenus *de doctõribus**, nor uninstruc- tive to see the progress of the Papal Power in the constitu- tion of Constantine Cobalt *de intercessione et reliquiis sanc- torum*, and that of Michæl Palæologus, *de primatu & appellatione Papæ Rome*. If to these he will have the patience to add the titles on Testaments and marriages in the Civil and Canon Law, which are not very many, his information will not be contemptible. I have, (but whether ever before printed I know not), superadded another advice for a longer course, written by Dr. Stanhope many years ago, which I should recommend in preference to mine, to those who are willing to labour. I have only chalked out more suited to the indolence of modern times,

Dr. Stanhope's Directions for the study of the Civil
Law.

To him that would fit himself in his studies for prac- tice in the Ecclesiastical Courts I would give, says he, these directions following :

* Whether an Academical degree of L. L. D. makes a man fully Doctor utriusque Juris, is a mighty question with Voet.

1. To read diligently Justinian's institutes, with the scholia of Mynfinger et Theophilus' short paraphrase thereon—next to read the title de Regulis Juris, with the Commentaries of Decius et Bronchorst thereon.

2. To have the whole body of the Civil Law, and during the continuance of the studies aforesaid, (as also upon all other occasions) to turn to, and observe well the texts alledged and referred to by those writers, especially to be conversant in the 6 first Titles of the first book of Justinian's Code, and such other Titles thereon as relate to Church matters, to Testamentary and Matrimonial Causes; there will be better information of these by inspecting the Titles themselves. The body of Law which I would have to be present is that which is published with Gothofred's notes. The Novel Constitutions of Justinian may be read over with greater care and exactness, Gothofred's notes thereon being also taken along therewith.

3. The body of the Canon Law must also be had, the reading of which intirely is laborious, and (I think) needless, the benefit expected from thence may (I suppose) be obtained these two ways: 1st. by reading de Appellationibus, de Exceptionibus, de Presumptionibus, de Probationibus, de Testibus and by reading such Titles therein as refer to Beneficiary Causes, and to Matrimonial and Sponsalitial Causes, concerning the latter of which (If I mistake not) the Canonists may be most safely followed, as that which is least obnoxious to exceptions from
Common

Common Lawyers. The other benefit expected from reading the body of the Canon Law, is in reading the *Institutiones Juris Canonici*, and the Title *de regulis juris canonici*, with the Commentators thereon.

4. While a man is conversant in these he may occasionally apply himself to the reading of some practice authors, as *Rebuffi Praxis*, *Marantæ Praxis*, *Tholosani Syntagma Juris Civilis and Canonici*, *Abbas Panormitanus*, *Augusti Barbosa de potestate et officio Episcopi*: here it's requisite to have, (and make constant recourse to) *Britonius de verborum significatione*, *Budæus's Lexicon*, *Oldendorpius*, or which contains all, *Calvini Lexicon Juridicum*.

5. To accommodate these studies to the practice of our Ecclesiastical Courts, the student must seek to furnish himself with, and be conversant in 4 sorts of books.

1. He must have such as contain the Laws and Constitutions of the Church of England, viz. *Linwood's Collection of Provincial Constitutions*, and his *Gloss* thereon; the *Constitutions of Otho and Othobon*, and *Johannes de Atho* his *Gloss*; the book called *Reformatio Legum Ecclesiasticarum*, (though it have no force of Law with us) yet is worth the reading, as containing much both of matter and practice consonant to what is set down in other books of more approved authority; also here may be consulted *Sir Henry Spelman's Councils* and Especially, the knowledge is to be obtained of the several

Canons

Canons
land, a
Sparrow

2. B
and Sta
must be
ters, wi
Kingdon
briefly i
his table
taments
to which
Executo
taments
Church
Civilis i
as have
tis in th
Articuli
Statute
and the
Statute
and the
Reign,
of King
beth, cap
do in the
Edward
same Sir
VOL.

2. Because some competent knowledge of the Canon and Statute Law of these Nations is very requisite, there must be read such authors as write of Ecclesiastical matters, with reference to the Municipal Laws of these Kingdoms: Zouch has done well herein, though very briefly in his tract *De Jure Ecclesiastico*, and Dr. Cozen in his tables; and in the particular matter of Wills and Testaments, Swinburn's Treatise thereon is of particular use, to which likewise may be added Wentworth's Office of Executors, and Meriton's Touchstone of Wills and Testaments; see also the same Meriton on the Office of Church Wardens, and Dr. Duck de *Auctoritate Juris Civilis in Anglia et Hiberniâ*; consult also such authors as have written on the Statute called *Circumspecte Agatis* in the time of King Edward I. and the Statute called *Articuli Cleri* in the time of King Edward II. and the Statute of Marriages in the time of King Henry VIII. and the Statute of Nonresidence and Pluralities, and the Statute of proving Wills and granting Administrations, and the Statute concerning Tythes in the same King's Reign, and the Statute concerning Tythes in the Reign of King Edward VI. the Statutes of the 1st of Elizabeth, cap. 2. and the Statute de *Excommunicato Capiendo* in the 5th* of the said Queen, and especially what Sir Edward Coke hath written on any of these; see the same Sir Edward Coke in his 5th report de *Jure Regis*

VOL. II. h Ecclesiastico;

Ecclesiastico; also his Jurisdiction of Courts in the chap. of Ecclesiastical Courts. Much fine learning and knowledge may be had of this kind, from the reports of Common Lawyers, chiefly from Coke's and Crook's Reports, the Abridgement of both which will well inform herein, the originals may be inspected, especially those two, viz. De Commendam et Premunire; under this head may be comprehended Hugh's book called the Parson's Law, Cowell's Institutes and Cowell's Interpreter, and Spellman's Glossary.

3. Controversies have been raised concerning the bounds of the Ecclesiastical Courts, both as concerning the matters to be proceeded upon therein, and the manner of proceeding; these have been excellently and learnedly debated by Dr. Cosen, in his *Apology de causis Ecclesiasticis*, and Sir Thomas Ridley in his view of the Civil and Ecclesiastical Law, in both which books much learning is contained, and much knowledge in the Ecclesiastical Laws of his Majesties kingdoms may be had from thence; see also Bishop Saunderson's book, intitled *Episcopacy not prejudicial to Monarchy*. The writers concerning Tythes may be consulted, as Selden, Spelman, Montague, &c. and concerning Matrimonial Contracts, and other things incident thereunto; Bishop Hall, and Bishop Taylor on Cases of Conscience may be read.

4. As to the practick parts, besides those other before mentioned, these may be read, Zouch de *Judiciis Ecclesiasticis*, and Clerk's *Praxis*; the latter is the approved model

model
deserve

As
Law a
here to
mer L
ground
some m
to for

Plan of

Woo
which a
fully Ba
Pleaders
Raym.
Salk. R
to the
which t
Bacon's
ing the
Hales' P
Law of

* It is in
that great

model of practice in all our Ecclesiastical Courts, and deserves to be well read and digested.

As this work is addressed to Students of Common Law as well as Civil, it may not be totally irrelative here to subjoin some directions in the study of the former Law also, usually though I know not upon what ground ascribed to certain eminent persons. I do it in some manner to save trouble, being very often applied to for such advice.

Plan of study preparatory.—Ascribed to Lord Mansfield *.

Wood's Institutes, Blackstone's Commentaries, after which attend the Courts, reading at the same time carefully Bacon's Abridgement title Actions, also titles Plea, Pleadings; Com. Dig. title Pleader. Burr. Rep. Lord Raym. Rep.—P. Wm's. Rep. Fitz's. Nat. Brevium. Salk. Rep.—Plowden's Comm.—Coke's Rep. referring to the Institutes as there quoted; for other titles of which the Student wishes to have a deeper knowledge Bacon's Abr. is to be used as a book of reference, reading the references carefully. For the Crown Law read Hales' Pleas of the Crown, and Hawkins' and Gilbert's Law of Evidence, with Foster, and Keyling.

* It is impossible that this short cursory plan should have come from that great man.

Lord Camden's supposed Plan of study for the Bar.

Black's. Com.—Bacon's Elements, that part called the use of the Law—attend the Courts, reading at the same time Litt's. Tenures; Finch on Law:—Hale's Hist. of Com. Law:—Littleton again with Wright and Gilbert's Tenures;—Wood's Institutes—Coke's Institutes and Reports—Plowden's, Hobart's and Vaughan's Reports;—Lambert de Priscis Anglorum Legibus;—Glanville;—Fleta—Briton—Bracton—Mirror—Doctor and Student;—Fitzherbert's Natura Brevium.

Course of Study ascribed to Mr. Dunning.

Blackstone's Commentaries, Coke Littleton, especially all fee simple, and fee tail; with Tenant in tail read statute Westm. II. c. 1., and the case of Cooke and Beale in Lord Raymond, Salkeld, and P. Wm's.: with Tenant by curtesy read Paine's case, (8. Co. 87.)—with *Dower* read Vernon's case (9 Co. 1.) with *waste* read Coke's notes on the statute of Marlbridge, ch. 24. and read the last chapter on Rents: the greater part of the 3rd Book is necessary, particularly the last chapter on estates on condition, and learn the exact difference between condition and limitation.

The two first leaves of Tenant for years should be read carefully; after this read particular heads making Blackstone your order, read Bacon's Abridgement and Equity

Equity abridged with the material references which are mostly to Raymond, Peere Williams, and Salkeld—when any modern Book refers you to an old Reporter read it, and then only ; read Pigott on Recoveries, Burrow's Reports, Cruise, and Fearne.

Plan of Education for the Bar—said to have been communicated to a young friend, by a great Judge still living.

A good scholastic education founded upon Grammar ; and so much versification as will gain a taste for the best Greek and Latin Poets, and direct the pronounciation of those languages, especially of the latter, which will frequently be wanted.

A residence at the University for two years—the 1st. and 2nd. years so much of Euclid, Rutherford, and Locke, must be attended to, as may be necessary for a general sketch of the Mathematics, Natural Philosophy and the Rules of Thinking, with the less laborious and more agreeable improvement in the best Classical Authors ; not forgetting the English writers.

In the 3rd. year a close attention to Chronology, Geography, and History, both antient and modern, with Campbell's state of Europe ; the trade, interest, and policy of neighbouring nations.

In the 4th. year—to learn French ; to have a cursory view

view of Justinian's Code and Digest and of the Civil Law * in general. To take up the Roman History from the time of Julius Cæsar—get a general Idea of both his expeditions into Gaul and Germany, and both invasions of Britain, collecting his anecdotes and customs of the people.

Then Tacitus de moribus Germanorum, and de vita Agricolæ—then Selden's Janus Anglorum; then Wotton's Leges Wallicæ; then Wilkins's Leges Saxonicæ; then Norman Statutes in Ruffhead to the first of Richard I. when our leges non scriptæ are said to end, and Statute Law pleadable as such begins.

Almost all the great Volumes and frightful parts of the plan will require only a turning over to get a general knowledge of the times.

Before Justinian, should be read Ferrier's History of the Civil Law, and upon Wilkins, Hale's History of the Common Law.

When the student is thus arrived at the beginning of our Statute Law, it will be soon enough for him to take up Blackstone—who by his quotations will excite him to look into Bracton, Fitzherbert, Coke upon Littleton, Brooke, the regular year books, old Reporters, Doctor and Student, Commentators, &c. &c.

Thus will the Student lay for himself such a founda-

* The very thing which this work proposes to give.

tion of legal and constitutional knowledge, as will enable him to follow his profession with advantage, and secure to himself a prospect of imitating the greatest man, to the honour of himself, and the certain dignity of his family.

Could the writer of this choose his Court and practice, he conceives the most ancient and learned is the Court of Exchequer.

Observations.

Were I sure, or had I even any strong evidence to persuade me that the several modes of advice given above really proceeded from the great men, to whom they are ascribed, (and there appears internal evidence to the contrary), I should not presume to add any comparatively feeble observations of mine. Not being so convinced, although I think them well worthy of note; I will venture to add a few.

I have found in the course of experience, advice of this kind often too much tinged by the accidental habits or employments of men. The mode and course of study to which a gentleman had in his youth been accustomed, the branch of business to which his inclination or his success had attracted his mind, even the particular important cause in which he happened at the time to be employed, would give a colour to his councils*.

Hence

* I once, to my surprise, was told by a great Lawyer, above all things to get a knowledge of accounts. It was explained, when I perceived he was on a reference, springing out of a great Chancery suit, on a most complicated and intricate account, obscured by an uncommon

Hence I have heard various advice ; such as to begin with the perusal of Coke upon Littleton, and Coke's Reports—or to commence with Craig, Dalrymple; Wright, and an infinity of authors on tenures & feudal law—or to spend a great deal of time, while a student, in getting a minute knowledge of the works of Cruise, Fearne, &c. &c.—or to go into an Attorneys office—or to spend half the period allotted to the attendance on Inns of Court in a special pleader's office. To the first will occur the obvious objection, of the great difficulty, obscurity, and consequent discouragement, of such a path without any guide, unless the Inns of Court would really furnish such according to their original intent *,—to the second, I answer that a deep knowledge of the Feudal law is a good thing, and so would be a knowledge of the Mosaic and of all the laws of civilized nations in past ages, if the life of man were three hundred years, but what Student has time for such research? on the next it may be observed that many a man in considera-

mon mode of book-keeping. Any and every species of knowledge is certainly useful to a Lawyer; but he might as well as have recommended an intimate acquaintance with the construction of a saw mill or a sucking pump (as with Italian book-keeping) because a man sometimes may have occasion to cross-examine as to them. Were I to recommend any technical knowledge of this sort above another, it would be that of surveying; the ignorance of which, in questions of part and parcel, so often puzzles Court, Council and Jury.

* I have been told that there are at some of the Inns of Court men reading wall lectures as they are ludicrously called in the English Universities, who are very capable of giving effective instruction. Much as students complain of want of assistance, I scarce ever knew in any place young men who would receive it, unless compelled by penalties.

ble

ble business has found little for the abstruse knowledge of contingent remainders or springing or shifting uses, till he has been perhaps many years at the bar, but at all events that it is little probable that he will, at the first opening of his profession—the rudiments of an Attorney's practice as education for the bar will never be approved by men regularly educated*,—and as to the last, though the utility of the knowledge cannot be denied, it must be owned that if it be made a sole object of attention, a technical Student might come out of a special pleader's office, little acquainted with the first principles in Coke upon Littleton.

Of all the plans of study above premised, that marked by being ascribed however groundlessly to Mr. Dunning best accords with my ideas. An affected and conceited contempt for the Commentaries of Sir William Blackstone is sometimes fashionable, and the phrase of the primer of the law is a cant word, but what says Sir William Jones (as he is in a late publication relative to this very subject justly styled, the all accomplished and

* I never did meet a man who had not a regular education, who could reason accurately, or feel the force of reasoning. The advantages of a little mathematical learning, and still more of logical, though perhaps not acknowledged at the time, are sensible through life. It seems surprising, that more stress is not laid on academical degrees, where they are chastely bestowed. Want of method, and endless talking characterise the irregularly bred. They neither reason nor feel the force of reasoning. It reminds one of a saying of the King of Prussia as to the Russians at the famous battle of Zorndorf; these fellows do not know when they are beat.

universally lamented Sir William Jones, a Lawyer, a man of science, of taste, of genius) they are, says he, the most correct and beautiful outlines that ever was exhibited of any human science. Can there be any doubt then that this ought to be the *initial* book. If a stranger wishes to explore a country, what does he first want? Surely a general map or outline: and where can he find it, but in Sir William Blackstone's work, now aided and improved by the excellent notes of Dr. Christian.

Having then read this work over once (or a second time if it be necessary to implant it in his memory) and then subjoined the book which it superceded, but the perusal of which is still useful, I mean Wood's Institutes, the Student has got a general view of that region which he wishes to know, instead of cutting it through the thick dark wood of Coke's Commentary upon Littleton, where a few breaks of light only would illuminate his puzzled vision. I would advise him still to keep his map in his hand, and take up Blackstone once more, and consider it as his text, though bearing no proportion in size or matter to the illustration upon it which he is now going to seek. With the second volume when it begins to treat of feudal tenures, let him read the writers thereon, though in my opinion the three chapters of Blackstone on the subject, the excellent Lectures of Dr. Sullivan and the first volume of Robertson's History of Charles the Fifth, will give him sufficient knowledge at first. When he comes to the chapter on fee simple, let him for the first time take up Coke on Littleton and read the correspondent parts, and

so

so on
to find
him;
ings,
that I
Confir
cal wo
case r
report
four ve
after c
on Wi
head o
of Mr.
to in t
Suit at

Whe
ing to t
Digest
when h
viz. on
he has
all the c
the per
pected
liams, an
stone, le
The seco
of the r

so on throughout the work: if he be at a loss where to find them, the Index to Coke on Littleton will tell him; for instance, when he looks for Demurrers, Pleadings, or Juries, he would not guess without consulting that Index, that they were under the heads of Esuage, Confirmation, and Rents, in that strangely immethodical work. Let him along with these chapters read every case referred to by Mr. Justice Blackstone in the several reporters, and let him continue to do so throughout the four volumes, and with leases read Bacon on that head, and after closing the second volume let him read Swinburne on Wills. When he comes in the third volume to the head of actions, let him with each action read the notes of Mr. Justice Buller thereon, and all the cases referred to in that learned book, and also Boote's History of a Suit at Law, and with Courts the fourth Institute.

When he has arrived in this slow manner of proceeding to the chapter on pleading, let him turn to Comyn's Digest on that head, and read the cases referred to, and when he comes to the last chapter of the 3rd. volume, viz. on Courts of Equity, let him lay aside the book until he has perused Fonblanque's Treatise of Equity, and all the cases therein referred to, which will lead him to the perusal of the very superior notes of my much respected friend Mr. Cox on the Reports of Peere Williams, and when he resumes the fourth volume of Blackstone, let him along with it peruse the third Institute. The second Institute should be read as the consideration of the several statutes of which it treats occurs, and

Reeves Juridical History as occasion requires * and the Treatise's of Hale and Hawkins on Pleas of the Crown. and if he has not time or resolution to do all this, before he is called to the bar, let him follow the general plan and do as much as he can of it.

To this if he adds a practice of analysing pleadings and conveyances, asking himself the reason of the order and construction of the different parts † and using himself to attempts to put them together, with attendance on the Courts as soon as he finds himself capable of receiving instruction therefrom, (of which his own experience alone can judge,) he will *come* to the bar a better Lawyer, than most of those, at least in Ireland, who have been admitted to it, where I never knew but one man (now deceased) who studied law, *from the beginning*, as a science.

To this plan it will be objected, by some that it requires too little, by others that it requires too much; to the first I answer that this advice is accommodated to what is likely to be done, not to what ought to be done: Did I think there was any chance of a young mans following it, I would give very different advice: then my Lord Manfield's kind of plan should be their guide, a thorough acquaintance with ethics ‡ should precede, and
a deep

* To Mr. Reeve's ideas of the constitution I have nothing to say: His History of the Law, a work observed by Sir Wm. Blackstone to be so exceedingly wanted, is undoubtedly a book of great erudition and great utility.

† E. G. Why the term for years is introduced in a settlement before the estates tail,—when and why two sets of trustees are necessary,—with a million of other questions that must occur to a beginner.

‡ Ethics ought to form the foundation of legal as well as of political know-

a deep knowledge of Civil and Feudal Law followed by the perusal of Bracton, Briton, Fleta, Fortescue, Littleton, and Plowden's, Coke's, and all the other great reports in order of time should bring them down to the present day, through every gradation and alteration; but who will do this? every young man going to the Temple thinks he cannot be satiated with advice, and with vast ideal appetite devours in anticipation huge quantities of learning; let common experience tell how his design terminates, and whether in nine instances out of ten he brings back more than crude fragments of rudimental knowledge.

As to the objection that I have given no advice as to the reading of reporters, those who peruse the advice above, will find that the man who follows it, will be very deeply read in reporters both ancient and modern, consulted according to different heads; a better method

knowledge. The Works of Cicero, Cumberland, Grotius, and many others ought to be familiar. Let me particularly mention in our own time, those of Mr. Gisborne, fraught with that sincere and unprejudiced love of truth, without regard to rooted theories, and dangerous falsehoods honoured because ancient or because fashionable, he has truly made morality (to use Bacon's expression) the handmaid of religion, has illuminated real virtue obscured by a thousand rash positions, and supplied a great desideratum to the man of business, by applying the precepts of morality to real and active life: To the Lawyer his chapters on promises and engagements are particularly interesting.

He almost singly has dared to oppose many almost universal prejudices, as they always appeared to me, E. G. the common notions as to extorted promises; and dangerous positions, E. G. as to promises inconsistent with imperfect obligations.

perhaps

perhaps than reading them upwards or downwards in order of time, or through each volume as a man reads a Dictionary. Besides the man who has read thus much, will be able to direct himself, and want no further advice*.

If it be asked, will all this *certainly* bring success at the bar? I answer, no. But it is the most *probable* means, and whoever pursues it, (though want of spirits, though want of health, though modesty and sensibility, or secret pride unfitting him for that cultivation of the sources of business so necessary in the beginning, though the distractions of other business and pursuits, though that dangerous love of the Belles Lettres so often the bar of profit and advancement†, though any other cause disappoint his hopes) has no reason to reproach himself, and has done his duty; and if independance produces inattention, he cannot complain of the world.

* On eloquence I am silent, for I do not affect capacity to deliver its rules, nor do I believe that it ever was taught. Nature, genius, times, circumstances, the heart are its parents. Query whether it doth not as often defeat as promote success in life—witness great present examples in both countries.

† I believe, says Sir Wm. Jones, that if I had reflected on the little solid glory which a man reaps from acquiring a name in literature, on the jealousy and envy which attend such an acquisition, on the distant reserve which a writer is sure to meet from the generality of mankind, and on the obstruction which a contemplative habit gives to our hopes of being distinguished in active life, I should not have been tempted by any consideration to enter upon so insidious and thankless a pursuit.

Preface to his translation from the Persian, of the life of Nadir Shah.

No.

Since

CUR

Rector

Bishop

nue him

Ecclesia

some f

made,

Hind,

How

jurisdic

Resid

none, a

341.

Seque

dence,

Eccle

former

A Pr

Court f

of their

easy as

in 1798

No. III.

Cases Decided

Since Bullingbrooke's Work was published.

CURATE cannot be removed *without cause*, by a Rector who has appointed him by certificate to the Bishop promising to allow him a Salary, and to continue him in the office till otherwise provided with some Ecclesiastical preferment, unless lawfully removed for some fault, and if so, he must have notice. *Quere* made, whether Bishop may remove him. *Martin v. Hind, Cowper 437.*

How far Courts of Common Law have concurrent jurisdiction in suits for legacies, *Atkins v. Hill, Cow. 287.*

Residence must be in the parsonage house; if there be none, at least in the parish. *Wilkinson v. Abbot, Cowp. 341.*

Sequestration of a benefice no excuse for non-residence, *Cowper, 129.*

Ecclesiastical Leases in England can only be of lands formerly letten, *Douglas, 573.*

A Proctor or a Register, cannot sue in the Spiritual Court for his fees, *Douglas 629.* N. B. the recovery of their fees in the Law Courts has been rendered as easy as that of Attorney's in Ireland, by an act passed in 1798.

How

How far the nature of a Donative is changed by being augmented by Queen Anne's bounty. *King v. Bishop of Chester*, 1 T. R.

The party is in full possession of a donative on the nomination merely, *ibid.*

A Mandamus will not be granted to a Bishop to licence a Curate of an augmented Curacy, where there is a cross nomination, *ibid.*

The Bishop's licence is necessary to the nominee of a perpetual curacy, but not to the nominee of a donative, *ibid.*

As to *Lecturers*, cases on special circumstances, 1 T. R. 331. and 4 T. R. 135.

Possession alone of a *pew*, though for above 60 years not sufficient title; but possession for 36 years, where it is appurtenant to a messuage, good presumptive evidence of a faculty, and a faculty gives title. *Trespass* will not lie for entering into a *pew*; it must be *Case*.

Taking up dead bodies, even though for the purposes of dissection, an indictable offence. *R. v. Lynn*, 2 T. R. 733.

Action on the case for dilapidations of a Prebendary's house may be maintained by Prebendary against his predecessor. *Radcliffe v. D'oyly*, 2 T. R. 630.

In

In l
they be

Who
appoint
by virt
T. R.

If th
charge,
will not

Fish
comput
day on
reckonin

Mont
otherwi

If a r
in anoth
dit lies,
not be g
any speci
in A, an
fication o
he object
Marquis

Right
by Court
Vol.

In leases void by non residence, no difference whether they be by deed or by parol, 2 T. R. 749.

Whether in case Dean or Chapter neglect or refuse to appoint a Canon residentiary in proper time, the Bishop by virtue of his general visitatorial power may do it. 1 T. R. 650.

If the Spiritual Court hath cognizance of part of a charge, and not of the rest, *after sentence* prohibition will not go, 2 T. R. 473.

Fish are titheable by custom. 3 T. R. 385. Where computation of time is to be made from an act done, the day on which the act is done is to be included in the reckoning. 3. T. R. 623.

Month in law always means a lunar month, unless otherwise expressed. 6 T. R. 224.

If a right of nomination be in one and of presentation in another, and either impede the other, a quare impedit lies, or bill to enforce a right, and a mandamus will not be granted (which never is granted where there is any specific remedy) and where the right of nominating is in A, and of presenting in B. B. is to judge of the qualification of the person nominated, as a Bishop does, but if he objects for immorality it is tried by a jury. R. v. the Marquis of Stafford, 3 T. R. 646.

Right to a pew adjudged in a consistorial court reversed by Court of Arches, but both courts admonished the de-

pendant not to sit in the pew; these sentences not conclusive evidence in an action for the disturbance between the same parties. *Crofs v. Salter*, 3. T. R., 639.

Mandamus to Church Wardens to make a Church rate refused, it being a matter of Ecclesiastical Jurisdiction, 5 T. R. 364.

Mandamus to admit a Vestry Clerk refused. 5 T. R. 713.

No action at Law lies for a legacy, *Deeks, v. Shutt*, 5 T. R. 690. There was no express promise in this case.

Grant of next presentation interrupted by King's right who promoted to a Bishopric, revives after the King's right satisfied, 6 T. R. 495.

Case of a Lecturer, 4 T. R. 135.

Prohibition granted to stay a suit in the Spiritual Court for breaking open a chest in a church, and taking away the title deeds to an advowson. 4 T. R. 351.

Masters of Grammar Schools must be licenced by the ordinary, who may examine the party applying for a licence as to his learning morality and religion, and may suspend granting it, till he submits himself to be examined touching his sufficiency in learning. *R. v. the Archbishop of York*. 6 Ter. Rep. 490.

TABLE

TABLE

Of the most remarkable Ecclesiastical Statutes made in Ireland since Bullingbrooke's Work was published,

11 and 13 Geo. III. c. 16. relates to parochial chapels of ease and perpetual cures in parishes of large extent, and takes from persons resident in the districts belonging to such chapels of ease, the obligation of repairing the mother church.

ch. 17. is the Primate's *Building Act*.

ch. 22. is an act to prevent persons burying dead bodies in churches, under penalty of 10l. which goes to repair the church.

13 and 14 Geo. III. chap. 27, is an act for erecting chapels of ease in the diocese of Armagh particularly, with some clauses relative to building viz. If not finished three fourths only to be recovered, this since altered, see 25 and 38 of the King. 15 and 16 Geo. III. relates to Glebe lands.

17 and 18 Geo. III. chap. 28, explains the act of faculties, and cures the want of a dispensation, to those possessed of dignity or other church preferments, on 25th December 1777.

19 and 20 Geo. III. chap. 6, Sacramental test repealed as to Dissenters.

21 and 22 Geo. III. An Act for relief of Protestant Dissenters, as to their marriages.

———— chap. 20. relates to manner of converting to Protestantism making it more simple and easy.

———— chap. 27, enables Governors of schools to make long leases of school lands.

———— ch. 31, enables the Clergy to issue execution for tithe debts under 5l.

———— ch. 52 obliges Church wardens to account by enabling Bishops to sue the successors, if they should have neglected to sue their predecessors.

23 and 24 Geo. III. ch. 49, An act for making appropriate parishes perpetual cures, and provides for the case of Church wardens not taking the oath.

25 Geo. III. ch. 21, relates to buildings and dilapidations, enables persons to recover sums legally expended on *part* of a building.

Ch. 38.

———— Ch. 38, makes a copy of the registry of Incumbents' induction, together with a certificate of his assent and consent sufficient evidence, when he is called upon to prove Incumbancy.

———— Ch. 49 relates to buildings—that copper may be used instead of flates.

———— Ch. 58, for better maintenance of Parish Clerks, see another in 1796.

27 Geo. III. ch. 36, Compensation act. 28 Geo. III. ch. 44 ditto.

Riotously obstructing or hurting a Clergyman officiating, felony without Clergy. 27 Geo. 3. ch.

29 Geo. III. ch. 26, An act for the better enforcing the payment of first fruits.

———— Ch. 27, An act for the better providing for the repairs of Churches and residence of the Clergy. It makes *applotments* for repairs of Churches good, if signed by Minister or Curate, and three Protestant parishioners, though Churchwardens do not sign the same, and enacts that *glebes* which can be spared from one parish may be annexed for ever to contiguous parish, unions and divisions of glebes to be registered.

30 Geo. III. ch. 29, Protestant dissenters may be *Guardians*. Papists may appoint Guardians, any but Popish Ecclesiastics.

31 Geo.

31 Geo. III. ch. 19 a *very material act*, amending the Primates building act, and the 13 and 14th of the King, ch. 27. In this year also the act of the 28 for enquiring into education funds is continued.

32 Geo. III. ch. 28, enables *Guardians* to grant an acre for new Church and Church yard.

————— ch. 34, purports to amend the act of Anne relative to exchange of glebes, but relates merely to the diocese of Cork, and the lease of Ballinaspeg.

The King may call together the Parliament, giving 14 days notice, notwithstanding any prorogation. 33 Geo. 3. ch. 20.

33 Geo. III. declares that the repeal of Sacramental test relates only to *dissenters*.

35 Geo. III. ch. 12 makes acts of parliament valid from the time of giving the royal assent.

————— ch. 32 the tithe act of which an account is given in page 351.

————— ch. 33, the celebrated act as to leases, given in the appendix to the 1st. vol.

36 Geo. III. ch. 58, an act for establishing friendly societies by me introduced, and by the government and public much approved, which act ought to be universally known.

Additional

SINC

been de
the pay
arrears
for adul
cruelty
divorce
divorce
ries was
urged o
and tha
against
him wh
held tha
screen a
offence.

Br

This
was stro

Additional Cases.

Fea v. Fea.

SINCE the printing of the former note, this case has been decided, and the husband has been relieved from the payment of alimony, on his paying the costs and all arrears to the day: his first attempt was to get a divorce for adultery, though she had already obtained one for cruelty; this the court rejected as a solecism for a person divorced to seek a redivorce, but admitted that after a divorce for cruelty, the subsequent discovery of adulteries was a reason for doing away alimony, though it was urged on the other side that there was no cause in court, and that a matrimonial sentence *transit in rem Judicatam* against the person seeking to break, though not against him who seeks to establish a marriage. But the Court held that it never can pass *in rem Judicatam* so as to screen any criminal from the consequences of his or her offence.

Briggs, v. Sir Annesly Stewart and Williams.

This cause came on to be heard on the appeal. It was strongly urged again that the bail were made to be
security

security for a different ship, from that for which they profered to be security; but the Court was unanimously of opinion that it lay upon the appellant to shew that they were different ships, and unless some ground was laid to excite a suspicion of their diversity, they would presume their identity. It was urged on the part of the Appellant that the Judge below had nothing to amend by, and that to amend the bail bond or stipulation by his own sentence was absurd, as that sentence had nothing to warrant it as to the names of the ship and Captain, to which the Respondent answered that the insertion of those names in the sentence was justified and supported by the manner in which the original appearance of the Appellants' Proctor was entered; but this entry was not shewn or proved to the court. The Appellants' strongest arguments were, that they the bail in consequence of this change of names never could recover *over* against the persons for whose ship they had gone security, and if they took the ship itself, they could not send her to sea, because the name under which alone they could legally take her, would differ from her name in the Registry. The Respondents said they had in the contest taken her name from the Custom House Registry. Decreed, *Male Appellatum*.

Wood v. Hannah.

This cause since the printing of the former part of the Appendix has been disposed of. An exception was on the 9th of May, 1799, put in by the Danish Captain to the jurisdiction of the Court of Admiralty, stating that the

the vessel
French
neutral
condem
Court, (f
Denmark
treaties
England
cery of th
Christian
up to pul
and sold
by the m
and got a
tified by
under hi
seized by
grounds
Admiralt
executed
promover
land, viz
not upon
court; an
as in any
said capt
inasmuch

* Such a
held in the
tals, and in
tice in the C
Vol. I

the vessel had been on the 20th April, 1798, taken by a French ship of war near the coast of Norway, beyond the neutral limits, and carried into Christianfand, and there condemned by the decree of a *French Vice Admiralty Court*, (for such it appeared to be) *authorised by the law of Denmark*, and by the law of nations, and allowed by the treaties between France and Denmark, and Denmark and England, and stiled the Court of the *Chancellerie* or *Chancery* of the French *Consulage* for the French Republic at Christianfand *: that the vessel was under said decree set up to public auction by his Danish Majesty's city register, and sold in open market, and there purchased bona fide, by the merchants; that she was almost entirely rebuilt, and got a Danish registry, and then by a bill of sale ratified by the Danish Burgomaster of the place, was sent under his command to the port of Belfast, where she was seized by the promovent in said port; and upon all these grounds the party did *except to the jurisdiction of the Court of Admiralty* in Ireland, *inasmuch* as the sale of the ship was executed upon the land, and if any wrong was done to promovent in purchasing said vessel, it was done upon the land, viz. at Christianfand in the kingdom of Norway, and not upon the high seas, nor within the jurisdiction of this court; and even if the said purchase could be considered as in any wise connected with the original capture, the said capture is not within the cognizance of this Court, *inasmuch* as it hath not any prize commission.

* Such a Court however extraordinary has been permitted, and held in the war of 1761 in Norway, both by English and French consuls, and in the present war for some time in America. See *ante*, *Practice in the Court of Admiralty*, p. 171. note.

The long vacation approaching, and the impugnant being apprehensive that the exception might not be disposed of until the next term, *applied* to the Court of King's Bench, for a *prohibition*, which was strenuously opposed.

Council against the application insisted, that this was a prize question triable only by the Court of Admiralty, that it was in vain to try to separate the question of sale from the question of condemnation and of the authority of the Court of Norway, since the sale is derived from the condemnation, and the bill of sale recites the sentence in Norway; that the question as to the legality of that Court, or the propriety of its proceedings, was a question of the Law of Nations, not properly cognizable by Courts of Common Law.—That a sale in market overt must be perfectly free from fraud, which even though unknown to the buyer would vitiate it.—That the old idea of a prohibition going because it was a contract upon land, in *partibus transmarinis* was done away in *Menetone v. Gibbons*, 3 Term. Rep. That even supposing this were a mere question as to whose property the ship was, the Admiralty has concurrent Jurisdiction, and suits for restitution have been frequent there, and that any authorities cited to support this application could only be from obsolete and antiquated decisions.

On the other side I answered, that this was a mere question of property, viz. Whether a ship belonged to *A.* or *B.* the proper subject of an action of Trover or Replevin, but with which the Court of Admiralty
had

had no
in a *bon*
it, whic
jurisdiction
might b
any mar
a Sheri
Court o
hand to
would n
rality.
Court J
the ship
cause; b
time affa
by peace
as this, v
Violet v
cases.

That
Jurisdiction
rules. I
or haven,
case just
also repo

So if
larly in p
Rep. 11
Cro. Car

had no more to do, than with a dispute about property in a *house*, unless the name of *ship* had some magic in it, which always and necessarily gave the Admiralty Jurisdiction, which no person would assert; E. G. a ship might be mortgaged for a Law debt not springing from any maritime cause, or it might be taken in execution by a Sheriff, and who would think of applying to the Court of Admiralty in any such case: so if sold from hand to hand, the Vendee to get possession of her would never think of applying to the Court of Admiralty. We must recur to the principles that give that Court Jurisdiction, there must not only be a lien on the ship, but that must also spring from some maritime cause; but neither a covenant totally irrelative to maritime affairs, although binding a ship, nor a quasi tort by peaceably getting possession of a ship in such manner as this, would give the Admiralty Jurisdiction: and so is *Violet v. Blague*, Moore, 891, and numerous other cases.

That even supposing the Admiralty *generally* to have Jurisdiction, it was here ousted by *particular* well known rules. If the libel be for the *ship itself* being in a port or haven, the Admiralty Jurisdiction is ousted. See the case just mentioned of *Violet* and *Blake* in Moore, and also reported in 2 Croke, 514.

So if the libel be for a matter done on land, particularly in *partibus transmarinis*, prohibition lies, see Hob. Rep. 11. *Bridgeman's* case p. 79, *Palmer v. Pope*. Cro. Car. 623, *Ball v. Trelawny*, 12 Co. 104 *Thomlinson's*

linfon's case, 1 Roll. 528, l. 50, nor was the case of Menetone *v.* Gibbons an exception.

So if the libel be for a matter where the original was upon the sea, but afterwards there is an act upon the land whereby the property is altered, as if goods taken (by Pirates even) are sold on *land* in market overt, and vendee is sued in the Admiralty, prohibition goes, 2 Brownlow, 29, 1 Roll. 531, l. 52, and the effect of altering the property is further seen in this, that if a ship be taken by enemies at sea and afterwards retaken, it shall be tried by the Common Law, 2 Brownlow, 11. Weston's case, 4 Inst. 154.

All these circumstances concur here.

That as to saying this was a question of Prize, it was not; it was a question about a sale in open market, totally distinct from any question on the original capture: but if it was, the Admiralty of Ireland has no prize Jurisdiction, and so it was lately determined in the case of the Grecian ship, vide ante page 153.

That as to the Court not being competent to decide on the legality of the French Consulage Court in Denmark, it was not called upon to do so; but if it was and it should be answered, that the question of the sale was inseparably connected with that of the capture and brought the latter and the Jurisdiction of the Court in Denmark necessarily before the Court, it did so collaterally and incidentally, and the Court of K. B. has full authority

authority to judge of the jurisdiction of Foreign Courts of Admiralty as it doth every day in questions of insurance: That the Court of Admiralty had no concurrent Jurisdiction in such a case as this, nor could a single authority be adduced to shew it had, or had ever tried such a cause, and as to Council not producing modern cases to support their argument, the reason was, that in modern times no one had ever thought of setting up such a Jurisdiction.

That in Sir Leoline Jenkins' letters, (and no higher authority can be cited as to matters of the Admiralty) 2 vol. p. 734, is a case of a French Privateer, taking a Dutch vessel, and bringing her into the port of Youghal in Ireland, where the High Court of Admiralty condemned her, and she was sold, on which occasion though that great Judge denies the authority of the Irish Court of Admiralty to entertain that cause, yet says he, "I do not see how the purchaser can be ousted of his possession, for more than probable the bargain was made between the buyer and the privateer *upon the land* and consequently the cognizance of the validity of it will be prohibited to the Admiralty, and if a verdict at Common Law shall find the sale to be a good sale, the claimant will be without remedy."

The Court granted the prohibition, and that (on account of the very special circumstances) upon the last day of term, though to do so is contrary to all usual practice.

Material Notes omitted in their proper Place.

Appeals.

IN Page 138 I have said that in Ireland an appeal ought to be interposed in ten days, the practice however is otherwise, usually giving 15, because as Bullingbrooke 1 vol. p. 100, observes, the English Statutes respecting Appeals being couched in general language, were supposed, though I think improperly, to extend to all his Majesty's dominions. I still think that unless those statutes have been made Law here by Lord Yelverton's sweeping act, that the rule of the Canon Law ought to prevail, and such I understood to be the sense of the Delegates in Lecky and Cave, though the decision did not rest on that. In Lecky and Cave the attempt was to shew that there was no legal limitation of time whatsoever to appealing in Ireland.

The time within which the appeal when lodged, must be brought to hearing after the exhibition returned, is as follows :

On the return of the Inhibition into the Registry with a proper affidavit of **service** on the Judge, Register and party, and notice thereof to the Respondents' Proctor, he may appear in the rule book, serve notice of his appearance, and pray a libel; in *four* days after
this

this last
of cour
i. e. if
ed, the
then ag

App
Court
24 Geo

In I
of Com
the den
the effe
vailing
draw to
sider th
which t

The
have ta
and oth
behalf
land-ho
of the
the pet
threate
der the
claim n

this last notice, a libel must be filed, otherwise a dismiss of course; this libel must be answered within *six* days, i. e. issue joined: and then in *ten* days after issue joined, the proctors, must lodge or exchange cases, and then agree to appoint a day to hear the cause.

Appeals from the Admiralty of Ireland are now to a Court of Delegates according to the Irish act, 23 and 24 Geo. III.

AGISTMENT.

In 1735 certain persons having petitioned the House of Commons for relief in the matter of agistment tithe, the demand of which they asserted to be novel, and that the effect of that demand was to increase a then prevailing disposition in the Protestants of Ireland to withdraw to America. A Committee was appointed to consider the Petition, which came to certain resolutions to which the House afterwards agreed.

The Committee in its report begins by stating that they have taken into consideration the petition of *Samuel Law*, and others, [whose names are thereunto subscribed] in behalf of themselves, and the rest of the gentlemen and land-holders in this kingdom, setting forth, that many of the clergy in several parts of this kingdom, where the petitioners dwell, have lately commenced, and others threaten to commence suits for a new kind of tithe, under the name of agistment for dry and barren cattle, a claim never made by the clergy, nor heard of by the petitioners

tioners until within these few years, but very grievous to your petitioners, and to all those who have been sued for the same.

That the petitioners, and their ancestors, have purchased their estates, without any apprehension that the lands of this kingdom could be legally charged with this unknown demand, and consequently have no allowance in the purchase thereof.

That suits in equity for such tithes of agistment multiply very fast, the clergy taking example from one another, and the petitioners humbly apprehend, that this demand, unless timely prevented, will soon become a general grievance throughout this kingdom.

That if such demand shall be generally set up, the petitioners humbly apprehend, it will ruin many of the land-holders, who have taken leases at a full improved yearly value, without any consideration had of their being liable to any uncommon charge of tithe, and very considerably injure the petitioners, and others, in their estates and property. That the proceedings of the clergy in such demands, the petitioners humbly conceive, will greatly increase the present prevailing disposition, which the petitioners with concern observe in the protestants of *Ireland* withdrawing themselves and their effects to *America*, and will, in consequence, greatly impoverish the petitioners, and many others of his Majesty's faithful subjects, and impair the protestant interest and strength of this kingdom. And praying, that their

said

said case might be taken into the consideration of the House of Commons, and that they would grant the petitioners, and the rest of the gentlemen and land-holders of this kingdom such relief therein, as in their great wisdom should seem meet.

And upon the whole your Committee came to the following resolutions.

Resolved, that it is the opinion of this Committee, that the petitioners have fully proved the allegations of their petition, to the satisfaction of the Committee, and deserve the strongest assistance the House can give them.

To which resolution, the question being put, the House did agree.

Resolved, that the allotments, glebes, and known tithes, with other Ecclesiastical emoluments, ascertained before this new demand for tithe of agistment for dry and barren cattle, are an honourable and plentiful provision for the Clergy of this kingdom.

Resolved, that the demand of tithe agistment for dry and barren cattle is new, grievous, and burthensome to the landlords and tenants of this kingdom, who could have no notice thereof previous to their purchases and leases, nor the least apprehensions, that such unforeseen demands could have been claimed.

A motion being made, and the question put, that the commencing suits upon these new demands must impair

the protestant interest, by driving many useful hands out of this kingdom; must disable those that remain to support his Majesty's establishment, and occasion Popery and infidelity to gain ground, by the contest that must necessarily arise between the laity and clergy.

The House divided.

Noes, within 50.—Tellers Mr. Cope, Mr. Dawson.

Ayes, without, 110.—Tellers Mr. Morgan, Mr. Rochfort.—It was carried in the affirmative.

Resolved, that all legal ways and means ought to be made use of, to oppose all attempts that shall hereafter be framed to carry demands of tithe-agistment into execution, until a proper remedy can be provided by the Legislature.

ADMIRALTY.

If the reader will consult the various cases in Term Reports under the head of *ship* and *lien*, I think he will find strong confirmation of the principles which I have laid down as to Admiralty Jurisdiction.

That the Captain has no lien on the ship, nor has any tradesman for work done in harbour at home, notwithstanding Sir L. Jenkin's opinions, is clear from *Wilkins v. Carmichael*, Douglas, 97.

By The 1st. 2nd. and 3rd. positions mentioned in page
166, I

166, I mean these laid down by Courts of Law in the beginning of p. 165. I fear this is not expressed with sufficient clearness.

ARTICLES 39.

The signature to the 39 Articles is not in Ireland required before institution, yet it is required from every *Preacher*, and particularly demanded from heads of Colleges, and the signature to the 1st. Canon includes approbation of them.

B A R R E N L A N D.

The barren land acts in Ireland are 5 Geo. II. ch. 9. which exempts lands taken in from sea, lough, or river, and converted into arable or meadow, for 7 years from any new tithes of hemp, flax, or rape; he who claims exemption must give 6 months written notice to the Clergyman, of the time from whence, quantity, quality and situation, with a map verified on oath by two surveyors, to be registered in diocesan registry, and to be conclusive evidence of every thing but the title to exemption.

Without these precautions the best possible lands because never before improved, would have been construed to come under the exemptions. The 33 Geo. III. ch. 25, frees barren heath or waste ground improved into arable or meadow from all tithe for seven years, but no prohibition grantable under this act, without lodging a true copy of the libel and suggestion, and proving the latter by two witnesses within six months, on pain of double costs and damages.

BUILDINGS.

I still fear on this head that from the very complicated nature of the statutes respecting buildings I may not have been sufficiently clear in explaining the object of them, and therefore will beg leave here again to shew particularly the object of 31 Geo. III. ch. 19.

Under the Primates' act a doubt had arisen as to what the person building or improving on a *new site* was entitled to if he died before building or improvement finished.

The statute 13 and 14 Geo. III. ch. 27, settled it, that he was to be entitled to three fourths of the sum expended, provided the latter did not exceed 2 years income of the preferment, his successor to get two fourths and so on.

The statute 31 Geo. III. ch. 19, put matters on a different footing; it enables builder or improver to get a certificate for so much and no more as was the difference between what he would have been entitled to if finished, and the sum necessary to be expended in finishing, to be ascertained by Commissioners by proof on oath; his successor finishing to be considered as original builder on new site, and to recover the whole amount both of what he paid to predecessor and expended himself, not exceeding two years income: his successor
again

again to be reimbursed three fourths, his two fourths, his one fourth of the aggregate.

Again on *old sites*, the case of the building or improvement not being finished was not provided for, or at least fully ascertained. The statute therefore enacted, that *builder or improver* though *not on a new site*, dying or removed before the work finished, should receive no more than the difference between what he would have been entitled to if work finished, and the sum necessary to be expended in finishing; his successor to be considered as original builder *not on new site*, and to receive three fourths of the aggregate of what he paid, and expended, not exceeding a year and half's income; that successor to be reimbursed two fourths and his one fourth of said aggregate, and successors not finishing are put on the same footings as improvers under 9 Geo. II.

CHURCHWARDENS.

The Spiritual Court may compel Churchwardens *to deliver their accounts*, but cannot *decide* on the propriety of the charges. If they take any step after the accounts delivered in, prohibition goes, *Leman v. Goulty* 3 T. R.

COMMISSION OF REVIEW.

The granting a commission of review in *Goodwin and Geisler*, see *Irish Term Reports*, can scarcely be deemed an exception to the general doctrine in the Appendix as to their not being granted, on account of the very particular circumstance of the case.

CURATES.

CURATES.

See p. 222, as to Mandamus for a licence, the same is said in 1 Term Rep. King v. Bishop of Chester, but the case when inspected, again relates to *Preachers*, or perpetual Curates. If temporary Curates are included it must be as Preachers.

CANONS BINDING LAITY.

It may seem odd to some after the famous case of Middleton and Crofts, 2nd Atkins, to speak of proceedings against Church-wardens for offences against the Canons, but it must be remembered that the decision there was only that the Canons do not bind the laity *proprio vigore*, not that they do not reach them where the Canons are merely declaratory of the ancient usage and law of the Church received and allowed in these countries. See head Church-wardens last page.

DELEGATES.

It is said that Delegates cannot grant *Administration*, 2 Bul. 4, but they can after repealing an administration granted below says 2 Roll, 233, and so is the practice.

EXEMPT JURISDICTIONS.

I am informed that an extraordinary exempt jurisdiction exists in Newry and its vicinity, in a Layman who grants marriage licences, &c. &c.

LEASES.

LEASES.

It may under this head be not amiss to add the opinion of an eminent council on the following case.

A Bishop had from 1718 received a moiety of the rent reserved upon an ancient Chapter lease, made as I suppose before the disabling statute; no evidence could be got beyond that period; the lease having expired, a renewal was given agreeable to the law 10 and 11 Ch. I. receiving a fine; the Bishop claimed a moiety of the fines, the Chapter disputed his claim.

An opinion of the highest authority was given that the Bishop's claim was well founded, the fine being a compensation for the new increase of the rent; that his title might be supported upon other grounds besides length of enjoyment, such as the Cathedral church having been originally the Parish Church of the Diocese, but length of time alone was sufficient; that if the Chapter obliges a Bishop to proceed at law, he must sue them collectively, and not the **Æ**conomist individually; that the rents on such a chapter lease, and indeed the general revenues of the Chapter were to be applied in the first place to reparations and other necessary expences of the Church, and the fines and surplus to be distributed rateably according to ancient usage.

PREROGATIVE.

In the Index to the Irish Reports, a query is stated to have been made generally, whether the Prerogative Court
can

can examine witnesses *viva voce*, to satisfy the conscience of the Judge; the case doth not warrant any such *general* query, it was only made under the particular circumstances of that case and the nature of the examination therein.

PROCTORS.

It is said in 3 Mod. 332 and 335, in Carthew 169 and 170, and various other cases, that no *Mandamus* lies to restore a Proctor in the Spiritual Court, for that he is not a public Officer, nor is his an office, but only an employment in that Court. I cannot easily be reconciled to this doctrine, and the reasoning in these cases on the other side was strong viz. that the party otherwise would be without remedy, and why should it not lie as well as for an Attorney of an inferior Court, this being an office of more public concern. In later times Proctors have been recognized by acts of Parliament, and privileges given to them similar to those of Attorneys, E. G. in recovering their bills of costs. Quere, whether the old determinations would rule at the present day.

TITHES.

The remarkable act of Edward VI. which empowers the recovery of the double value of tithes substracted in the Ecclesiastical Court, and the treble in the Temporal Courts, I have said doth not exist in Ireland; such is my opinion, and I never heard of a suit under it, yet Bullingbrooke

linbrooke according to the notions of his time, when any act in England seemingly extending to all the King's subjects, even though not expressly naming Ireland was supposed to bind that Kingdom, makes a query whether it be not law here, and certainly the act of 9 W. III. ch. 10 *supposes* it to be so.

SACRAMENTAL TEST.

The Sacramental Test was repealed as to dissenters by 19 and 20 of Geo. III. ch. 6. but it is expressly declared by 33 Geo. III. ch. 51. that this doth not extend to Members of the Established Church, so that acts giving further time to qualify are still necessary, and pass every session.

STIPULATION.

Stipulations in the Admiralty of Ireland are taken *under seal*; *Quere*, whether it would not be ground for a prohibition, certainly it is to avoid such risk, that they are not under seal in England.

SEAMEN.

See the Irish act 5 Geo. II. ch. 13, and an act passed in the last session in Ireland relative to the West India trade.

VICARS CHORAL

are subject to the Dean and Chapter. May be by them fined or deprived; need no institution; not in the patronage of Bishop. See Supplement to Harris's K. William.

VOID AND VOIDABLE.

What is said in the first volume on these heads may be further illustrated by what Lord Ch. J. Hale says, Hist. of Common Law, p. 33. "The sentences of the Ecclesiastical Courts do sometimes introduce a real effect without any other execution; as a divorce a vinculo matrimonii for consanguinity or frigidity, doth induce a legal dissolution of the marriage: so a sentence of deprivation from an Ecclesiastical Benefice, doth by virtue of the sentence, without any other coercion or execution introduce a full determination of the interest of the person deprived."

MISCELLANEOUS.

In *Osborne v. L. B. Williams*, Strange 80. is a remarkable instance of a Court of Delegates retaining a cause above; sentence had been given below. The question of the appeal was not upon the merits, viz. marriage or not, but on a collateral point to protract the time. The delegates after determining this point, retained the cause, *ad instantiam partis*, heard it on the merits, and confirmed the former sentence.

In the original patent of the Court of Prerogative, which I have read in the Rolls, is a power of attachment. An English act 16 Car. I. forbids Ecclesiastical Judges to inflict temporal penalties, and the law has ever since been so understood here.

In

In causes of defamation, Court may on motion of either party proceed summarily. 6 Geo. I. ch. 5. Irish.

Commission of Adjuncts granted. Ray. 475.

I have said page 69. that Germany affects to represent the Western empire, as Russia doth the Eastern. Not without some reason. The traces of each are strongly marked. In Hungary Latin is really a living language: in Russia the alphabet strongly resembles the Greek. A Russian book might *primo intuitu* be taken for a Greek one. Greek itself may be said to be a living language. I have met several Greek sailors of the ship mentioned above p. 152, who understood the ancient Greek (and used prayer books in that language) their Captain perfectly well. Their pronunciation governed by accent not quantity. Their modern Greek not unintelligible. Their log-book even, in Greek which I could understand.

It is said that some persons have been ordained in Ireland, under the age of twenty-three, on opinions given that the rubric is not here confirmed by act of parliament, surely it is, and with it the preface to the forms of ordination, by the act of uniformity.

On page 148 let me observe that there is no doubt that royal visitations may issue, notwithstanding the abolition of the High Commission Court. There is no connection between them.

I have omitted in its proper place a case on seamen's wage.

wages, worthy of note. It is Cutter and Powel, 6 T. Rep. p. 320.

To page 244 let me add this further and general table of oaths and subscriptions at institution, ordination and licencing of Curates in Ireland.

Recrs. Vicars, Curates,	}	subscribe	—	the four first Canons.
Priests, Deacons,				
Ditto,	—	sign	—	the Declaration and that of conformity to the liturgy.
Ditto,	—	take	—	the oaths of allegiance and abjuration.
Recrs. Vicars, Curates,	—	take	—	oath against simony.
Recrs. and Vicars,	—	take	—	the oaths of Canonical obedience, and of causing a school to be taught.
Vicars,	—	take	—	oath of residence.

INDEX

I N D E X

TO THE

L E C T U R E S

ON

C I V I L L A W.

[The Numerals refer to the Volumes, and the Figures to the Pages.]

ACCESSION, i. 207.

Accufation, ii. 61.

Actions and their divisions, ii. 54 to 60.

Adminiftrator, who fhall be, i. 325.

his oath, i. 323.

Adminiftration, i. 326, & 327.

Adoption—reaſons thereof at Rome, i. 74.

a

Adoption

never introduced in England, *ib.*

who might adopt, *i.* 76.

form thereof. 77.

effects thereof, *i.* 79.

Adultery, *ii.* 30.

what legal proof thereof, *ii.* 33, and note.

Advowsons, *i.* 139.

Alienation, *i.* 224.

Assumpsit and action on the case originated in the Civil Law, *ii.* 58.

Bankruptcy, *i.* 222.

Batchelors in college,—Whence the name, *i.* 114.

Bonorum possessio, *i.* 324.

Similitude of our administration, *Ibid.*

Bribery, *ii.* 40.

Capitis diminutio,—meaning thereof, *i.* 55.

Cæsar Augustus, character of him by Sir W. Jones,
i. 270.

Chancery—Court of, *i.* 93.

Civil death, *i.* 83.

Civil Law,—meaning of its rule, *Nemo potest mori ex parte testatus, &c. &c.* *i.* 184.

Contracts,—classification of them by the Civil Law, *i.* 334.

Nominate, *i.* 336.

Innominate, *i.* 377.

Ex verbis, *i.* 346.

Ex literis, *i.* 351.

Ex consensu, *ibid.*

Of sale, *i.* 352.

Contracts

Of exchange, i. 361.

Of hiring, i. 362.

Codicils, i. 268.

Collatio bonorum, i. 328.

Colleges.—College property and leases, i. 123.

when they assumed their present form, i. 111.

how the civil law contributed to their advancement, i. 112.

cases relative to Colleges, note to page 111.

passim, and Appendix to vol. i.

collegiate duties, i. 115.

Colleges at Rome, i. 100 & 115.

privilege annexed to proficiency in science at Rome, i. 120.

privileges of Colleges with us, i. 124.

Commodatum, i. 337.

Commons, i. 140.

Concubine, i. 36.

Conditions in restraint of marriage, i. 35.

Consideration,—Want of it how cured by the civil law,
i. 347.

Contracts quasi, i. 379.

Contracts de præsentī & de futuro, i. 23.

Crimen Falsi, ii. 39.

Corporations, i. 99.

origin of them at Rome, i. 100.

how divided by the civil law, ib.

how created at Rome, i. 101.

- how in England and Ireland, *ib.*
 Corporations sole unknown to the ancients,
i. 100.
 Corporations, two might make a corporation by the Canon
 law, *i.* 101.
 power and capacities thereof, *i.* 103.
 Could not take or purchase without a licence
 by the Civil Law, *i.* 103.
 our law on that head, *i.* 103.
 What majority of the community bound the
 rest, 107.
 Corporations how dissolved, 108.
 Negative given to the heads, 109.
 Protesting, power of, *i.* 110.
 Cox—Mr. his excellent notes on P. Wms. *i.* 233.
 Curators, what, *i.* 97.
 Culpa.—Lata, levis, levissima, *i.* 341.
 advantage of the Greek tongue in expressing its
 shades, 342.
 Damage, *ii.* 10.
 how distinguished from injury, *ii.* 11.
 Debts.—Distinction between the Civil Law and ours, as
 to payment of debts, *i.* 184.
 Degrees of kindred how computed by the Civil Law, *i.*
 15.
 Degrees in Colleges—whether a mandamus would go for
 them, and whether they can be now
 given in the Canon Law, *i.* 113. See
 also Index to Ecclesiastical Law.
 Delivery

I N D E X.

v

- Delivery or tradition, i. 213.
- Denunciation, ii. 61.
- Deportation—what, i. 83.
- Derelicts, i. 206.
- Descent.—Canons of descent by the Civil Law, i. 187.
 how they differed from ours, i. 187 to 196.
- Divorce, i. 41.
 First instance of it at Rome. i. 42,
 a vinculo matrimonii, i. 43.
 a mensa & thoro, *ibid.* & 47.
 solemnization thereof at Rome, i. 44.
 intention of the reformatio legum thereon, i. 50.
- Distribution—Statute of, whether borrowed from the Civil
 Law, i. 181.
 observations on it, 190 to 199.
- Donatio—mortis causa, i. 230.
 propter nuptias, i. 237.
- Dublin—University of,
 negative power of the head, i. 109. n.
 see also Index to the Ecclesiastical Law:
 Whether the Fellows need take the oaths in the
 King's Courts. N. B. they take them before
 the visitors i. 116.
 deficient in privileges, i. 124.
- Ecclesiastical Court—Sentence therein.
 how far conclusive evidence, i. 50.
- Emancipation, i. 84.
- Emphyteuses—or fee farm leases, i. 155.

b

Estates,

Estates in tail whether known to the Civil Law, i. 150.

for life, i. 153.

for years, i. 154.

at will and by sufferance, i. 161.

Eseheat, i. 218.

Exchequer, i. 236.

Executors, i. 287.

one proving a will sufficient for all, i. 281.

whether they can claim for trouble and pains,
i. 287.

different with us from the hæres factus of the
Roman Law, i. 288.

his oath, i. 322.

Falcidian—Law, i. 287.

Fishery—right of, i. 134.

in Ireland, *ibid.*

Forfeiture, i. 221.

Frauds—Statute of, as to wills, i. 252 and 314.

Fiscus—difference between it and *Ærarium*, and the
Patrimoniale, i. 219.

Fornication, ii. 24.

Gifts, i. 228.

Guardians and to whom appointed at Rome, i. 87.

how appointed, i. 88.

different species thereof, *ibid.*

Guardian known to our law, i. 88.

duty of a guardian, i. 93.

origin of Chancellor's power to appoint guar-
dians, i. 93.

Heir,—

- duty and power of guardians with us. i. 93.
difference between tutor and curator, i. 88.
- Heir,—natural, and of the Roman heir and heirship, i. 182.
institution of the *heres factus* by will, i. 277.
- Hiring of labour, i. 364.
of professional labour, how considered at Rome,
i. 365.
- Homicide, ii. 34.
whether manslaughter a distinction in the civil
law, ii. 34.
- Husband and wife, might sue each other at Rome, i. 38.
Might grant and contract with each other, i. 37.
he not answerable for her debts or injuries by the
civil law, i. 39.
could not be witnesses against each other, i. 40.
real ground of this prohibition, ib.
his power over wife's person, ib.
- Infancy,—definitions thereof, i. 9.
- Injury, ii. 13.
- Inquisition, ii. 62.
- Interest, i. 367.
- Interdiction of water and fire, *ab aqua & igni*,—reason of
it, i. 85.
- Invention or finding, i. 203.
- Judices at Rome,—how constituted, ii. 47 to 50.
corresponded to our juries, *ibid.*
not to our judges, *ibid.*
when they went into disuse, ii. 53.
- Judges,—

- Judges,—the real judges at Rome were called magistrates,
46 and 51.
Corruption in them how punished at Rome, ii. 41.
at Rome not permanent, ii. 47.
- Kingston, Duchefs of,—her case, i. 51.
- Lawyers, practice of them at Rome, i. 356.
Proculeians and Sabinians, *ibid*.
their fees, how considered at Rome, i. 365,
and note.
immoderate fees restrained by law, i. 366.
- Legitimation,—mode thereof, i. 70.
rejected in England, i. 71.
- Leases of Colleges, i. 123.
act giving power to Corporations to lease under
half value in Ireland, copy thereof, Append. 9.
- Leases in France and Switzerland, i. 154. and note.
long leases whether useful, i. 162.
- Lessees interest at Rome, i. 156.
- Legacies, i. 297, 298.
conditional, i. 301.
alternative, i. 304.
accumulative, i. 304.
the ademption of them, i. 309.
rules of our law concerning them, i. 307.
- Liberti and Libertini—the distinction between them, i. 4.
- Libels—how punished by the Civil Law, i. 272, note,
and ii. 16.
- Liberal arts—what so considered at Rome, i. 365.

Limitation

Limitation of actions, ii. 60.

of criminal prosecutions, ii. 43.

Mandatum, i. 374.

Marriage—why slightly treated of in the Institutes, i. 2.

How considered by various Laws, i. 3.

How contracted, *ibid.*

effects thereof, i. 37.

how dissolved, i. 41.

English marriage act never enacted in Ireland,

i. 13.

laws against clandestine marriages in Ireland,

i. 13 and 33.

laws against forcible marriages in Ireland,

i. 7 and 31.

distinction between marriages void and void-

able, i. 22.

distinction between promises to marry and pro-

mises in consideration of marriage, i. 24.

consent of parents, how far necessary, i. 11.

Marriage Morganatic, i. 26.

Roman ceremonies of marriage, i. 27.

Requisites, besides actual contracts, to valid

marriage in England and Ireland, i. 28.

marriage by use, i. 28.

in Scotland, i. 28.

Irish act as to marriages of Protestant Sectaries

i. 30.

Irish laws as to marriages of Papists, i. 34.

of idiots, 8.

Minority,

- of minors, 11.
- solemn at Rome, i. 25.
- second forbidden within the year at Rome,
i. 22 and 74.
- Minority when it ended at Rome, i. 87.
- Mines, i. 205.
- Mortgages, i. 164.
- Pignus and Hypotheca, how they differed,
 ibid.
- Negative,—how far given to heads of corporations, i. 109.
- Neutral ships, whether they make free goods, Introductory Lectures, p. 65. and see 2nd vol. p. 174.
- Nuptiæ & Matrimonium differs, i. 25.
- Nudum pactum,—the meaning of it different in the
Civil Law and ours, i. 347.
- Oath—of an Executor, 322.
- of an Administrator, 323.
- ex officio, whether abolished in Ireland, Appendix, 14. and see Index to Ecclesiastical Law.
- Obligations—how far dissolved, i. 381.
- Offences against religion, ii. 22.
- Occupancy, i. 200.
- Paraphemalia, i. 241.
- Partnership, i. 370.
- Paternal power—question thereon in the Royal Family
of England, i. 69.
- at Rome, i. 80.
- in England and Ireland, i. 82. and 85.
- Path—towing, i. 134.

Parricide

Parricide—how punished by the Scotch Law, ii. 36. in
note.

Prætor at first not governed by precedent, ii. 53.

Prescription, i. 214.

Pignus, i. 343.

Price of commodities,—whether the legislature should
ever interfere with it, i. 360.

Protesting—power thereof incident to members of cor-
porations, i. 110.

Property—origin of, i. 129.

Probate of wills, i. 320.

Quasi torts, ii. 16.

Quasi contracts, i. 379.

Relegation—what, i. 83.

how it differed from exile, i. 84.

Regents and non regents in universities, i. 114.

Rents, i. 141.

Remainders and reversions, i. 175.

how far they existed in the Roman Law,
and the opinions of Smith, Gibbon and
Halifax thereon, i. 178.

Representation—rules of, by our law, i. 190. to 199.
and see the tables in the Appendix.

Revocations of wills—express, i. 313.

implied, i. 316.

how affected by statute of frauds,
i. 314.

Robbery

Robbery, ii. 8.

whether it ought to be punished with death,
ii. 4.

Salvage acts in Ireland, i. 206.

Sea.—Captures at sea when irrecoverable, 203, and see
2nd vol. 174.

Slavery—pretended justifications thereof, i. 53.
how created, i. 56.

Slaves at Rome considered not as persons but things,
i. 55.

Masters power over them, i. 59.

Slavery at Rome compared with that of the villein and
negro, i. 60.

how dissolved, i. 62.

Slaves of punishment, *fervi poenæ*, i. 84.

Sea,—dominion thereof, i. 133.

Servitudes or services, i. 138.

Stellionate, ii. 40.

Simony, i. 222.

Stipulations, i. 346.

Societies, i. 370.

Stuprum—what, i. 32. and ii. 30. and 35.

Succession to personal estate, i. 190. to 199. and tables
in the Appendix.

Suicide, ii. 36.

Sureties, i. 349.

in the Court of Admiralty, i. 350.

Tenures, 149.

Treasurer,

- Treasure,—trove, i. 204.
- Testaments, i. 242.
 - solemn, i. 244.
 - form and manner of making, by the Civil Law, i. 249.
 - Signing, i. 250.
 - Attestation, i. 252.
 - Rules for interpreting them, i. 291.
 - Imperfect, i. 316.
 - Revocations of them, i. 313. and 316.
- Theft, ii. 3. and 37.
- Treason, ii. 24.
- Things—extra patrimonium, i. 131.
 - common, i. 132.
 - public, i. 133.
 - universitatis 134.
 - nullius, i. 135.
 - division of them different by the Civil and the Feudal Laws, i. 136.
- Titles to things—how divided, i. 200.
- Tithes, i. 139.
- Toleration—acts of, no head in the Civil Law, ii. 23.
- Tutor, difference between Tutor and Curator, i. 88.
- Trusts, i. 152.
 - improperly compared to the Roman fidei commissa, i. 312.
- Usufruct, i. 147.
- Visitore and visitatorial power, i. 118. and note.

Ways,

Ways, 140.

War,——different consequences thereof, in ancient and modern times, i. 202.

Wreck, i. 205.

Wills,——probate of them, i. 320.

solemn, nuncupative, i. 263.

inofficious, i. 319.

unsolemn privileged, i. 265.

how avoided by the Civil Law, i. 312.

witnesses to wills, credible and competent,
i. 255.

statute of frauds as to them, i. 252. and 314.

who could make them, i. 270.

of what, i. 275.

Women——their power to make wills, i. 275.

under perpetual guardianship at Rome,
i. 87.

could enter into contracts, though married,
i. 38.

Wrongs——private, ii. 3.

public, ii. 21.

Witchcraft, ii. 23.

AN

I N D E X

TO THE

ECCLESIASTICAL LAW.

ACCUSATION, p. 62 and 147.

Accuser—Public, p. 68.

Admiralty, — extent and bounds of its jurisdiction, p. 150, to 157, and again 173.
and see Appendix, p. 90.

Instance Court, 151, and 169.

Practice therein, 178.

Prize Court, 151.

Practice therein, 193.

Criminal Court, 153, and 176.

Practice therein, 195.

That the Irish Admiralty having no prize Commission, cannot entertain a suit relative to Prize Droits, 152.

Droits of Admiralty, 152, and 178.

Whether the Admiralty has Jurisdic-

INDEX OF ECC. LAW.

tion of *mere personal* contracts, 155.

Whether of *Personal Torts*, 169.

Historical account of the principal questions and disputes as to Admiralty Jurisdiction, 158 to 166.

Advantages of the Admiralty Jurisdiction, 168.

Remarkable questions still disputed in prize matters, p. 194.

Appeals from the Admiralty, celebrated resolutions of the Privy Council subscribed also by the Judges, as to its jurisdiction, p. 162.

Rules of Court in Admiralty causes, 180, 183, 193, 194.

Advowson, 285, p. 91.

Different kinds of, 286.

Disputed between two lay patrons, 291.

Between Bishop and lay patron, 295.

How far Bishop's *power* to refuse a Clerk extends, 291, &c. &c.

Advocatorum—*Primas or Prime Serjeant*, 69.

Advocatus—*Fisci or Attorney General*, 68.

Agistment, 351. and Appendix 87.

Answer of Defendant, p. 42.

Whether answers similar to our answers in Chancery, were known to the Romans.
ibid.

Antestari—explained, p. 20.

Appeals—p. 59, and 138, see also this head in notes in the Appendix.

Archdeacon

- Archdeacon—p. 215.
 Arches—Court of p. 3.
 Archbishops—p. 209.
 Armagh, struggles between it and the see of Dublin for
 the Primacy, p. 208.
 Armagh—Archbishop of, p. 6 and 7, 209 and 275.
 Articles 39—by few required to be subscribed in Ire-
 land comparatively with England, 244,
 see also this title in notes in the appen-
 dix.
 Audience—Court of, p. 16.
 Bail or Vades by the Civil Law, p. 20.
 Baptism, 276.
 Barren land, Appendix p. 91.
 Benefices, 284 and 285.
 Bishops, 211.
 whether they can sit as judges, 13.
 how far they can refuse a Clerk, 293.
 their power and duties, 258, 259.
 Bishop of Rome, his election, granted by the Empe-
 ror, 258.
 Buildings by Ecclesiastical persons, the Laws in Ire-
 land relative to them from 320 to 339 in-
 clusive, and Appendix, p. 92.
 Whether Incumbent be liable for all dilapi-
 dations though not in his own time, 341.
 Burial, 277.
 Canon Law—practice thereof, p. 71.
 Capture at sea when irrecoverable, p. 174. in *note*.
 Cashel—Archbishop of, 216.
 Cathedrals—removing, 374.

- Caveat—when not to be regarded, 295, 296.
Chapels, 386.
Christian, Dr. his excellent notes on Blackstone, 372.
and Appendix, 66.
Churchwardens, 224.
Church and Church yards, 371.
Repairs of Churches, 380.
Church rates, 382.
Clergymen—how excluded from Parliament, 256.
Clergy—Benefit of, 255.
Clergy—Number in Ireland, 265.
their duties, 266.
Clerks—Parish, 226.
Collations, 243.
Conclusion in a cause, p. 85 and 130.
Confessions, p. 41.
Consecration, 229.
Cork—Dean of his case, 341.
Court of *High Commission*, whether abolished in Ireland, p. 148.
Court of Admiralty, p. 149. and practice.
Courts Consistorial, p. 4 and 90. and practice.
Court of Prerogative, p. 4 and 136. and practice.
Court of Delegates, p. 9. and 141.
Criminal Cases—proceeding therein, 61, and 145.
Curates, 221.
Deans 211.
Rural 216.
when elective, 213.
Decretum primum, p. 23.

Decree

INDEX OF ECC. LAW.

Decree—first, in the Admiralty, whence derived, p. 23.

Degradation, 282.

Degree—whether it can be now given in Canon Law

314.

Delegates—Court of p. 9.

Delegates—whether they can grant administration, Appendix, 94. as to their retaining a cause, 142. and Appendix, 98.

Dispensations—see Faculties.

Disturbance of patronage, 290.

Dilapidations, 338.

Whether Incumbent be liable for all dilapidations, even though not in his own time, 341.

Deprivation, 280.

Donatives, 239.

Duplex Querela, 298.

Duplicatio, p. 36.

Ecclesiastical privileges and duties, 253.

Elections, 234.

in the College of Dublin, 237.

Evidence, 39 and 116.

Execution against the profits of a benefice, 254.

Whether witnesses were examined viva voce or in writing at Rome, 53.

Exceptions dilatory and peremptory, p. 31 and 104.

Civil and Prætorian, 36.

Faculties or dispensations, 313.

Act of faculties, 315.

The power of granting them, how vested in the Primate of Ireland, ib.

Faculties

- Faculties, Rule imposed on themselves by the Primates of Ireland, 313.
 Whether a prebend requires a faculty, 317.
 Whether a perpetual cure requires a faculty, 318.
- Gisborne, Mr. Appendix, 69.
- Glebes, 366.
- In integrum restitutio, 59.
- Institution, 243.
- Induction, 249.
- Jenkins, Sir L. p. 167. and 200.
- Jurisdiction—voluntary and contentious, 11.
- Jurisdiction peculiar, 16.
- Jus patronatus, 295.
- Kent—Professor of Columbia College, 171.
- Lawyers Roman—their ranks and honors, 67.
- Leases, Ecclesiastical, 388.
 great governing statute in Ireland as to them, p. 391.
 exceptions therein, p. 394.
 exceptions since, 395.
 effects of non residence, 396.
 leases of glebes and tithes, *ibid.*
 great diversities between the English and Irish laws on that head, 399.
- Lecturer, 223.
- Legates—3 sorts of, 5.
- Legati nati—who were, 4.
- Legatus Natus—Archbishop of Armagh was not, 6.
- Letters dismissory, 232.
- Litis Contestatio, 27. not generally understood.
- Ne Admittas, 296.

Neutral

- Neutral ships, whether they make free goods, p. 174.
in note.
- Oaths, 55.
- Oath ex officio whether abolished in Ireland, 146.
- Oaths required at institution, 244. and last page of
Appendix.
- Oaths administered on granting a marriage licence 277.
- Ordination, 229.
- Peculiars—Court of, 3.
- Plurality of benefices, 310.
Statute of Pluralities never enacted in Ire-
land, 312.
Differences of the Law of Pluralities in Ire-
land from that of England, 312 to 316 in-
clusive.
Same person cannot hold a Benefice in Eng-
land and Ireland, 313.
- Prebendaries,—how they differ from Canons, 214.
- Prerogative—Court of the Archbishop of Canterbu-
ry, 4.
When first held, 6.
- Prerogative —Court of Archbishop of Armagh, 8.
its origin different from that of Canter-
bury, 7 in a note.
- Prefumption, 57.
- Presentation, 240.
- Primate of Ireland, 7, 209 and 275.
whether legatus natus of old, 6.
- Probatio femiplena, 39 and 58.
- Proctors, p. 79. and 99.
cannot substitute until after contestation of
d suit,

suit, unless power contained in original proxy, *ibid.*

whether a mandamus lies to restore them, 123. but see Appendix, p. 96.

Prohibitions, 199.

Public written Instruments, 55.

Quare Impedit, 299.

Statutes in Ireland concerning it, 304.

late great alteration in the Irish law, *ibid.* see also Appendix to the first volume.

Rectors, 216.

Recusatio Judicis or challenge to the Jury, 39.

Residence—Duty of, 274.

Effect of non residence, p. 275, 276.

397.

Resignation, 280.

Review—Commission of, whether now ever granted, Appendix, 50. and 93.

Roman suit, how it illustrates modern practice, 17.

How it commenced, 119.

Seamen, Appendix, p. 97. statute as to them.

Service of the ancient church, 267.

Sextons, 227.

Sinecures—how distinguished from Noncures, 220.

Stipulations in Admiralty should be under seal, Appendix, 97.

Suits—divisions thereof, 72.

Petitory and Possessory, *ibid.*

Ordinary and deligated, 73.

Plenary

Uni
Ufu

- Plenary and Summary, *ibid.*
- In Prerogative and Admiralty all Summary,
136.
- Surrogates, 12. and *Appendix*, 15.
- Suspension, 280.
- Test—Sacramental, repealed in Ireland as to Dissen-
ters, 244—see also this title in a Note in the
Appendix, p. 97.
- Tithes, 346.
 - Divisions of them, 352.
 - Why so much exclaimed against in Ireland,
346 and 347.
 - Cry in a great measure unreasonable, 248.
 - Difficulties thereon in the way of the Clergy,
as to their collection in that kingdom.
 - Leading statutes necessary thereon in Ireland,
352 and 353.
 - Whether *all* tithe suits in Ireland should not
be *Summary* as the Law now stands, from
355 to 360.
 - Notice to draw, how far necessary, 354.
 - Mode of proceeding in a tithe suit, 362.
 - Power of two Justices to determine tithe
suits, 364.
 - Of the Exchequer, 365.
 - Advice to the Clergy as to tithe, 364. act of
Edward VI. not in force in Ireland, *Appen-
dix*, p. 96.
- Union of Benefices, 305.
- Usurpation, 290.

Vicars, 218.

Vicars, choral, subject to Dean and Chapter, Appendix, p. 97.

Wilberforce, Mr. Preface, p. 8.

Witnesses, 46.



FINIS.

Pref

Page

10

11

14

14

14

22

22

23

23

ERRATA & CORRIGENDA.

Preface, page 5. last line, after *authority* insert and *injuring the rights of third persons*.

Page 5. twenty-fourth line, for *owner* read *doer*.

- 24. last line but two, after *crime* insert *was* and dele the *comma*.
- 31. Note, fifth line, for *did* read *was*: after the word Augustus in ~~second~~ line from *of*. to *stupri* inclusive should have been inclosed in ().
- 34. in note, last line but one, for *causa* read *casu*.
- 46. third line, dele the *comma*,
- 48. note, fourth line, *Sacerdotis* read *Sacerdotes*.
- 49. note 9. fifth line, read *flagitioseque*.
- 58. fourth line, read *pignoratitia*.
- 65. last line but four, for *Non* read *Nox*.
- 69. second line, for *Advocatum* read *Advocatorum*.
- 71. last line but two, after *profer* insert *at present*.
- 99. fifteenth line, after *special proxy*, insert *or special clause in their general proxy*.
- 109. note, last line, for *of* read *in the*.
- 119. last line but two, for *witnesse* read *witnesses*.
- 141. note, first line, after *is* dele the *comma*,
- 144. last line but one, for *he remits* read *they remit*.
- 148. note, last line but three, for *Ordinary* read *Ordinaries*.
- 222. last line but five, for *his* read *him*.
- 224. note, last line, for *had* read *has*.
- 231. fourth line, for *Archdeacan* read *Archdeacon*.
- 237. note, line fourteen, before the words *ingenious minds* dele the word *the*.

237. last

ERRATA & CORRIGENDA.

Page 237. last line but two, for *Decretaliam* read *Decretalium*.

240. note, last line, after *outlawed* add *cannot present*.

241. note forty, for *Eatch* read *Latch*.

244. note, second line, after *degrees in Colleges* insert
yet they appear to be required by what are
called our University Statutes.

244. note, ninth line, after *Ireland* insert *as to dis-*
senters,

247. note, fourth line, after the word *interpreted* add
to be.

261. note, two last lines, dele *to*.

264. note, for *Vicar General* read *Vicars General*.

282. fourth line, after *orders* dele the *comma*, other-
wise the punctuation produces nonsense.

309. last line of note, after *enrolled* insert *a*).

316. line twelve, after the word *be* insert a *comma*.

344. last line, dele *to*.

399. note, second line, after *questioned* a *comma*.

A P P E N D I X.

Page 15. note, third line, after *expunged* a *comma*.

18. after *Drapes* and *Drapes* insert in the *Diocesan*
Court of Waterford.

26. fifth line, dele the semi-colon.

32. for *Lionel Jenkins* read *Leoline*.

33. tenth line, for *return* read *turn*.

36. seventeenth line, read *late Judge*.

54. last line but five, after *out* insert *one*.

63. third line, for *man* read *men*.

69. note,

ERRATA & CORRIGENDA.

70. after the first note *insert*,—but though eloquence may not be taught, it may be corrected, and surely it is with us capable of amendment. That passion for eternal ornament in subjects not properly admitting it, that grandiloquence and froth, too like the bombast of France, yet often too prevalent from the senate down to the news-writer, would scarcely be congenial to the correcter taste of an English audience, and it may be doubted whether the clear but simple statements, and pure but unadorned style of certain great men of that country, would originally have pleased here.

77. fourth line, for *Incumbancy* read *Incumbency*.
Passim. for *tythes* read *tithes*,—for *scite* read *site*.

84. after Menetone and Gibbons, for *an exception* read *a contradiction*, but *an exception* on account of the *subject* matter, viz. an *hypothecation* bond.

In the Preface to Vol. II. p. 8. in the last lines are these words, *will encourage some abler hand which be*: for *hand* you may read *writer* or for *be* the *owner* of the hand. I insert this Erratum, not seriously, but to shew how far some criticisms are founded; surely such ellipses may be left to the reader: in the criticised passage in an Introductory Lecture, *these doctrines may boast a little temporary success, or individual elevation*. Would the sense be a whit the plainer, if the words were transposed or the ellipses filled up as follows: *These doctrines may boast among their effects a little temporary success or elevation of individuals*.

AC 1011000 3 ATARIIT

SINCE this work had actually left the press, I have been favoured through the kindness and friendship of a very learned and highly respected Civilian in England *, with the report of a late important determination of that great Judge, Sir William Scot, on the right of searching neutral ships, in the case of the Swedish ships *sailing with convoy*, and intercepted by Captain Lawford, from which decision an appeal is depending.

It was there determined, that the right of visiting and searching merchant-ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a Belligerent Nation, *because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are :*

2dly, That the authority of the Sovereign of the neutral country being interposed in any manner of mere force cannot *legally* vary the rights of a lawfully commissioned Belligerent cruiser.

3rdly, That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search.

* * What pity that we have not regular Admiralty Reports in England.

* Dr. Lawrence..